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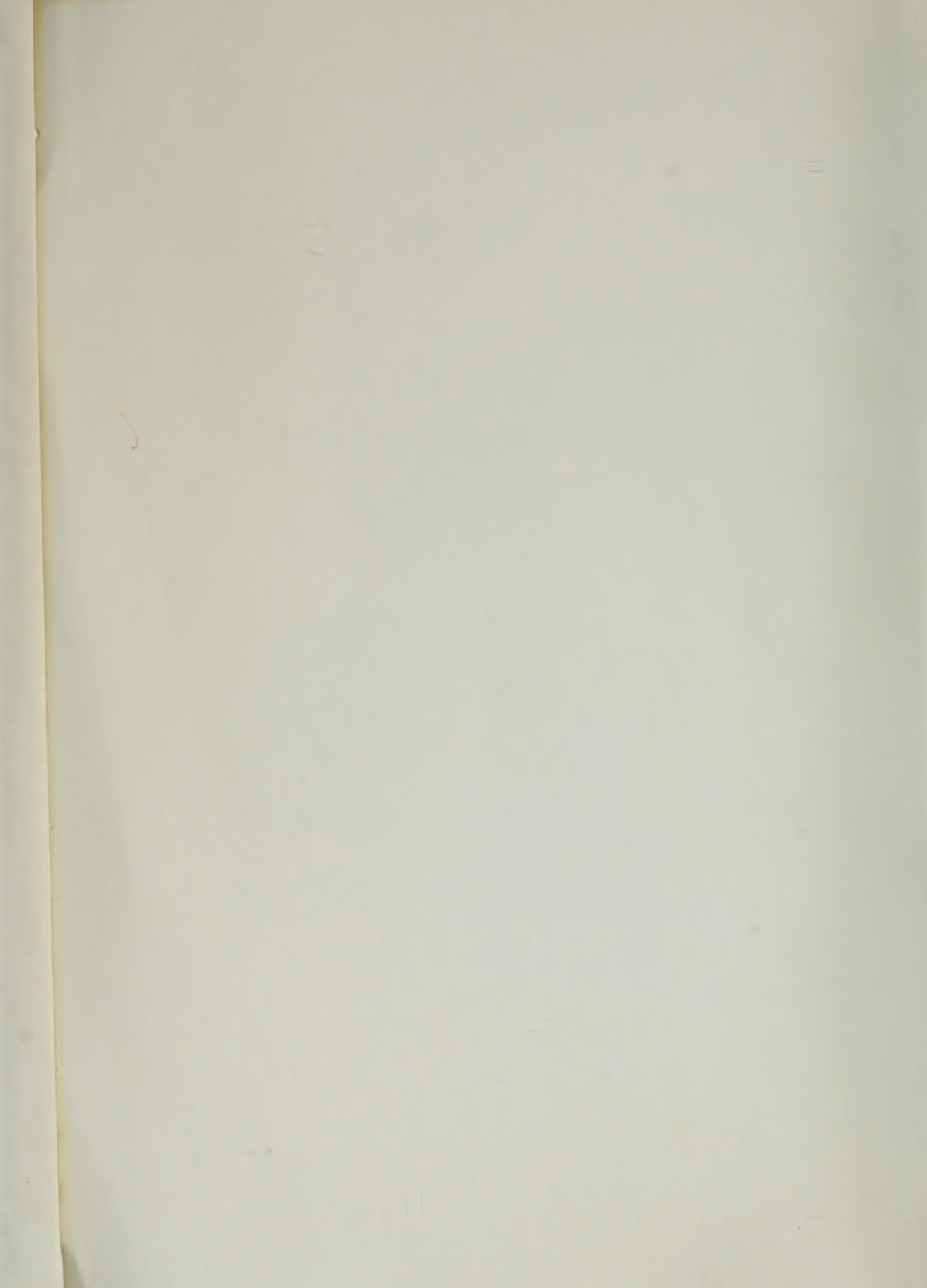
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No. 21834 ✓

In the
**UNITED STATES
COURT OF APPEALS**
FOR THE NINTH CIRCUIT

8450
v. 3450

WEYERHAEUSER COMPANY, *Appellant*
vs.
UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLANT

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JUN 20 1967

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BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court's Orders (R. 14, 17) are not officially reported, but are unofficially reported at 66-1 U.S. Tax Cas. ¶ 9417.

JURISDICTION

This appeal by Weyerhaeuser Company ("taxpayer"), involves federal income taxes for two calendar years, 1956 and 1957. Taxpayer timely claimed refunds for taxes and assessed interest paid for the years 1954-57 in the total amount of \$641,289.38. (Pret. Ord., Para. 1(c), R. 4). The claims were disallowed. (Pret. Ord., Para. 1(d), R. 4). On June 3,

1965, within the time provided by Section 6532 of the Internal Revenue Code of 1954, taxpayer commenced an action in the District Court for recovery of the taxes and interest paid. (Pret. Ord., Para. 1(e), R. 4). Jurisdiction was conferred on the District Court by 28 U.S.C. § 1346 (1964).

The Trial Court's Pretrial Order identified two issues labeled therein "First Question Presented" and "Second Question Presented." (Pret. Ord., Paras. 2 and 4, R. 4-8). The two questions were unrelated factually or legally. Taxpayer's appeal to this Court involves only the Second Question Presented for the years 1956 and 1957. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291 (1964).

QUESTION PRESENTED

Whether Section 631(a) of the Internal Revenue Code of 1954 applies to entitle taxpayer to capital gain treatment for gains realized by taxpayer on timber cut in the Seattle Watershed.

STATUTE INVOLVED

Sec. 631. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) **ELECTION TO CONSIDER CUTTING AS SALE OR EXCHANGE.**—If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than 6 months before the beginning of such

year) shall be considered as a sale or exchange of such timber cut during such year. If such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the fair market value of such timber, and the adjusted basis for depletion of such timber in the hands of the taxpayer. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this subsection, such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding on the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Secretary or his delegate, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this subsection except with the consent of the Secretary or his delegate. For purposes of this subsection and subsection (b), the term "timber" includes evergreen trees which are more than 6 years old at the time severed from the roots and are sold for ornamental purposes. (Int. Rev. Code of 1954, § 631(a), 68A Stat. 213 [1954]).

STATEMENT

All facts deemed material by the parties were stipulated and set forth in the Pretrial Order and Supplement to Pretrial Order entered by the District Court. (R. 3-13).

History

Taxpayer's appeal involves gains realized by tax-

payer from the cutting of timber. The timber producing taxpayer's gains was located in the Watershed of the City of Seattle, Washington. (Pret. Ord., Para. 2, R. 5-8). Taxpayer has long been an owner of timber in the Seattle Watershed. Scott Paper Company has been another owner (as a successor in the Watershed to Soundview Pulp Company). (Pret. Ord., Para. 2(e), R. 5).

Anticipating logging in the Watershed by taxpayer and Scott, the City of Seattle became concerned for the preservation of its water supply. In 1945 and 1946, Seattle took two steps to preserve the purity of its water and to assure reforestation of its Watershed:

(i) First, it imposed a limit upon the annual cut of timber from private lands within the Watershed by means of an agreement of August 1, 1945, between Seattle, taxpayer, Scott, and other interested parties (admitted into evidence as Exhibit 1). (Pret. Ord., Paras. 2(f) and (g), R. 5-6).

(ii) As the second step in the preservation of its water supply, Seattle persuaded taxpayer and Scott to log jointly in a single logging operation. (Pret. Ord., Para. 2(f), R. 5). This second step ultimately led to this lawsuit.

Joint Logging by Taxpayer and Scott

To meet Seattle's requirement of joint logging in a single operation, taxpayer and Scott made two contracts. (Pret. Ord., Paras. 2(h) and (i), R. 6-7). Both were dated January 21, 1946.

One of the contracts was admitted into evidence as Exhibit 2. (R. 8-9). Taxpayer and Scott were the sole parties to Exhibit 2. As a result of Exhibit 2: (i) the previously separate timber of taxpayer and Scott was, for logging purposes, united; and (ii) taxpayer and Scott each thereafter had an undivided half share in the united taxpayer-Scott timber. For convenience, the united taxpayer-Scott timber will hereinafter be termed the "Watershed timber." Exhibit 2 thus paved the way for a single logging operation in the Watershed timber: (Para. I(a), at 2-3)

"The parties hereto agree that within forty (40) years after August 1, 1945 all of the timber in their respective tracts of timber described in Exhibit A which shall be suitable for sawlogs and other forest products shall be logged and removed and that one-half thereof shall be delivered in the form of sawlogs and other forest products to each of the companies. Said timber shall be logged and delivered in a single operation in the manner provided in the logging contract. . . ."

The need for logging at two sites in the respective separate timber of the parties was thereby eliminated.

By uniting their separate timber and consenting to take *half* of the whole, taxpayer and Scott each ran an obvious risk. The risk was that their separate timber would not prove to be equal in value. In that event, one party would necessarily contribute more than half the value of the Watershed timber while receiving back (pursuant to Exhibit 2) only half.

Faced with the prospect of unequal contributions to the Watershed timber, taxpayer and Scott adopted

a simple remedy. They agreed that the party receiving (as its half share of the Watershed timber) more than it had contributed would pay for the excess: (Exh. 2, Para. II(b), at 4-5; see also Exh. 3, Para. IV(d), at 11-12)

“The stumpage to be paid by one company to the other from time to time shall be determined as follows: Within ten (10) days after the close of each calendar year the following prices shall be applied to the quantities of logs, hemlock pulpwood, and forest products other than said logs and pulpwood, removed and delivered from the timber of each of the parties hereto during the preceding calendar year: (1) the zone stumpage prices for logs prescribed in Exhibit A hereto, (2) the price of fifty (50¢) cents per cord of 128 cubic feet for hemlock pulpwood, and (3) the agreed price or prices, under paragraph II(a) above, for forest products other than logs and hemlock pulpwood. The difference in total prices, as so determined, shall be computed and one-half thereof shall be forthwith paid by the company from whose timber the lesser total value was produced during said year to the company from whose timber the greater value was produced. . . .”

As is customary where timber is acquired in amounts which cannot be precisely known while the timber is standing, provision was made for the scaling (measuring) of the timber and payment at the time of cutting (see Exh. 3, Para. IV(c), at 10-11).

The fixed stumpage prices prescribed in Exhibit A to Exhibit 2 varied according to zone and species. They were fixed as follows:

EXHIBIT A
"W" Timber

Zone 1	Fir	\$7.00 per M
	Other Species	\$3.00 per M
Zone 2	Fir	\$3.50 per M
	Other Species	\$1.50 per M
Zone 3	Fir	\$2.00 per M
	Other Species	\$1.00 per M

"S" Timber

Zone 1	Fir	\$7.00 per M
	Other Species	\$3.00 per M
Zone 2	Fir	\$3.50 per M
	Other Species	\$1.50 per M
Zone 3	Fir	\$2.00 per M
	Other Species	\$1.00 per M

The second contract made by taxpayer and Scott on January 21, 1946, is entitled "Logging Contract" and was admitted into evidence as Exhibit 3 (R. 9). Exhibit 3 confirms the right of taxpayer and Scott each to receive delivery of a half share of the Watershed timber: (Exh. 3, Para. IV, at 11-12)

"(d) As rapidly as rafts of logs are made up and scaled, the Timber Companies agree that the Operator shall, and it agrees that it will deliver (or cause Snohomish River Boom Company or its substitute agency, if any, to deliver) rafts of logs to the Timber Companies in such manner that each shall receive one-half of all logs of each species produced by the Operator throughout the life of this agreement from the timber of both Timber Companies and so that the total footage of logs of each species delivered to each of said Companies shall be kept as nearly equal as possible at all times. One-half of the other forest

products produced by the Operator shall be delivered by it from time to time to each of the Timber Companies at such delivery point in or near Everett, Washington, as each shall specify for itself from time to time and in such manner as to keep the total cordage or footage delivered to each Company as nearly equal as possible at all times.”

Exhibit 3 also implements the commitment to a single logging operation. It appoints Mountain Tree Farm Company, a corporation owned equally by taxpayer and Scott, as the single “Operator” to conduct the single logging operation in the Watershed timber: (Exh. 3, Para. I(a), at 2-3)

“ . . . The Timber Companies agree with each other and with the Operator that the Operator shall, and it hereby agrees to enter into the timber of both of the Timber Companies described on said Exhibit A and to cut, log and manufacture into sawlogs so much of said timber as shall be suitable for sawlogs and to cut and manufacture into pulp wood so much of the hemlock forest materials thereafter remaining in said timber as will make marketable pulp wood and, if Timber Companies hereafter jointly so direct, so much of the remaining forest materials of all other species as are marketable (all of which materials are hereinafter referred to as ‘other forest products’) and to deliver such logs and other forest products within the time and in the manner hereinafter provided.”

Taxpayer and Scott were each obliged to pay half the costs of logging, including costs of roads and Mountain’s compensation. (Exh. 2, Para. III, at 7-8; Exh. 3, Paras. II, at 5-6, and V, at 12-15).

At this point, on January 21, 1946, taxpayer and Scott had met Seattle's requirements:

(i) They had made ready for the single logging operation by uniting their separate timber and accepting undivided half shares in the whole pursuant to Exhibit 2.

(ii) They had implemented the single operation by appointing Mountain Tree Farm as the single operator pursuant to Exhibit 3.

As a result of meeting Seattle's requirements, taxpayer incurred a profound change in its economic position. Prior to signing Exhibits 2 and 3, taxpayer had an unqualified separate right to its former separate timber and no interest in Scott's timber. Afterward, taxpayer had an undivided half share in the whole of the Watershed timber subject to a duty to make stumpage payments to Scott at rates fixed in Exhibit 2 in any year in which taxpayer's half share of the Watershed timber exceeded the cut from its former separate timber. In the years in issue, 1956-57, taxpayer's half of the harvest from the Watershed timber did, in fact, exceed the cut from its former separate timber. (Supp. Pret. Ord., Para. 2(m), R. 11-12).

Tax Reporting Positions Taken by Taxpayer and Scott

Taxpayer and Scott each claimed capital gain benefits under Section 631(a) of the Internal Revenue Code of 1954 (and its predecessor Section 117(k)(1) of the 1939 Code) on timber harvested from the

Watershed. (Supp. Pret. Ord., Para. 2(j), R. 10). This provision authorized them to report their gains from the Watershed timber as capital gains to the extent that the fair market value of the timber in the year of cutting exceeded their adjusted basis for the timber.

Taxpayer's claim of Section 631(a) benefits is limited to those benefits arising from gains realized *by taxpayer* from its half of the Watershed timber—including the gains taxpayer realized from the timber acquired from Scott at the 1946 stumpage prices fixed by Exhibit 2. (Supp. Pret. Ord., Para. 2(1), R. 11).

The obstacle to taxpayer's claim is that Scott claims the same benefits. Scott claims Section 631(a) benefits arising out of *all* gains on timber cut from Scott's former timber, including the gains *realized by taxpayer* from such timber. (Supp. Pret. Ord., Paras. 2(j) and (n), R. 10, 12-13).

Taxpayer's difficulty is aggravated by the fact that its initial claims were consistent with Scott's; that is, taxpayer initially based its claims to Section 631(a) benefits on the gains realized from its former separate timber. Thus, although taxpayer's half of the Watershed timber included some Scott timber during the Section 631(a) benefits on gains which it realized from years in issue, taxpayer initially omitted claiming

the Scott timber over and above the stumpage it paid Scott. (Supp. Pret. Order., Paras. 2(j) and (m), R. 10, 11-12).

In 1956, however, the Washington State Tax Commission held a hearing relating to the Business and Occupation Tax returns of Scott. (Supp. Pret. Ord., Para. 2(k), R. 10-11). Taxpayer participated with Scott in the hearing and, for this purpose, for the first time received an analysis of Exhibits 2 and 3 by legal counsel. (Supp. Pret. Ord., Para. 2(k), R. 10-11). As a result of the analysis, taxpayer and Scott urged, before the Tax Commission, the same characterization of the contracts as taxpayer asserts here. (Supp. Pret. Ord., Para. 2(k), R. 11).

Taxpayer has since conformed its Federal tax position, for the years in issue and subsequent years, to the position which taxpayer and Scott took before the Washington State Tax Commission. (Supp. Pret. Ord., Para. 2(l), R. 11). Scott, however, has abandoned that position and declined to conform its Section 631(a) claims to taxpayer's claims (Supp. Pret. Ord., Paras. 2(k) and (n), R. 11, 12). With taxpayer claiming Section 631(a) benefits with respect to gains from its half of the Watershed timber, and Scott claiming with respect to more than half (i.e. with respect to all gains from its former separate timber, which in 1956-57 constituted more than half the cut from the Watershed timber, Supp. Pret. Ord., Para.

2(n)), the overlap of claims to Section 631(a) benefits is apparent.¹

SPECIFICATION OF ERRORS

1. The Trial Court erred in denying taxpayer capital gain rates under Section 631(a) of the Internal Revenue Code of 1954 on gains realized by taxpayer from timber it cut in the Seattle Watershed.

2. The Trial Court erred in holding, for reasons not explained in its Opinions, Findings, or Conclusions, that the stipulated proof was in even balance.

3. The Trial Court erred in failing to give sufficient weight to the undisputed facts that (i) taxpayer exclusively held the proprietary right in the timber essential to Section 631(a) benefits, (ii) taxpayer exclusively realized the gains on which the Section 631(a) benefits in issue are based, and (iii) only taxpayer reported such gains in taxable income.

4. The Trial Court erred in failing to give suffi-

¹Because the statute of limitations has barred the government from reopening Scott's return for 1954 and 1955, taxpayer voluntarily dismissed its action for the years 1954-55 with respect to this issue. (Supp. Pret. Ord., Para. 2(n), R. 12-13). As a result, the government acknowledges that there has been no duplication of capital gain benefits received by the parties with respect to timber cut in the Seattle Watershed during the closed years, 1946 through 1955. In fact, taxpayer has paid \$50,413 more for federal taxes during such years than it would have paid if it had asserted its present position from the beginning. *Id.*

While taxpayer's voluntary dismissal with respect to this issue for the years 1954-55 prevented (at taxpayer's expense) any prejudice to the government arising out of the conflict between taxpayer's and Scott's Section 631(a) claims for the years closed by the statute of limitations, the conflict remains, and must be resolved for the years 1956 and after. Taxpayer has assumed the burden of going forward, and the government is holding open the returns of both taxpayer and Scott pending a decision.

cient weight to the inequitable distortion of tax liability which results from a denial of taxpayer's claim.

5. Although the Trial Court did not give a rationale for its decision, it is probable that its holding was predicated in part upon erroneous failure to treat taxpayer as having cut taxpayer's half of the Watershed timber.

SUMMARY OF ARGUMENT

1. Section 631(a) permits capital gain treatment of gains realized on the cutting of timber by a taxpayer who owns or has a contract right to cut such timber. Its purpose is to give the timber holder who cuts timber the same capital gain opportunities enjoyed by holders who sell timber.

2. Taxpayer is exclusively vested with the proprietary interest in the timber which is essential to a Section 631(a) claim. By reason of its exclusive proprietary interest in the timber, taxpayer exclusively earned the gains which gave rise to the Section 631(a) capital gain benefits in issue.

3. Taxpayer, acting through Mountain Tree Farm Company, cut the timber from which the Section 631(a) benefits in issue were derived.

4. There is no rational alternative to approval of taxpayer's claim of Section 631(a) benefits on its half of the Watershed timber.

ARGUMENT

I. The Purpose of Section 631(a) Is to Permit Capital Gain Treatment of Gains Realized on the Cutting of Timber by a Taxpayer Who Owns or Has a Contract Right to Cut Such Timber.

Senate Finance Committee Report No. 627, Seventy-Eighth Congress, First Session, contains a clear and succinct statement of the purposes and operation of Section 631(a): (1944 Cum. Bull. 973, at 993)

“Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another. . . .

“In order to remedy this situation, it is proposed to amend the existing law as follows:

“If the taxpayer so elects upon his return, the cutting of timber during the year by the taxpayer who owns or has a contract right to cut such timber is treated as a sale or exchange of the timber cut during the year and such cut timber is considered property used in a trade or business of the taxpayer for the purpose of section 117(j) of the Internal Revenue Code provided the taxpayer has owned such timber or held such contract right for a period of more than six months prior to the beginning of such year. Where such an election is made, gain or loss to the taxpayer is recognized in an amount equal to

the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. The fair market value is determined as of the first day of the taxable year in which the timber is cut.”

In short, Section 631(a) is intended to give the timber holder who cuts timber the same capital gain opportunities enjoyed by holders who sell timber outright. In particular, for the purposes of this case, it should be noted that: (i) Section 631(a) allows capital gain treatment on the cutting of timber for use in business by a taxpayer who owns or has a contract right to cut it; and (ii) the measure of the gains is the fair market value of the timber on the first day of the taxable year in which cut, less taxpayer’s adjusted basis.

II. Taxpayer Is Exclusively Vested with the Proprietary Interest in the Timber Essential to a Section 631(a) Claim.

The Commissioner of Internal Revenue and this Court have declared that a requisite to Section 631(a) benefits is a proprietary interest in the timber producing the gains, i.e. *an unrestricted right to sell the logs for the taxpayer’s own account or to use them in the taxpayer’s trade or business*. In Treasury Regulations § 1.631-1(b)(1) (1957) the Commissioner states:

“ . . . In order to have a ‘contract right to cut timber’ within the meaning of section 631(a) and this section, a taxpayer must have a right to *sell* the timber cut under the contract *on his own account* or to *use* such timber in his trade or business.” (Emphasis supplied).

In Revenue Ruling 58-295, 1958-1 Cum. Bull. 249, at 250, the Commissioner further stated:

“To be entitled to the benefits of Section 631(a) of the Internal Revenue Code of 1954 as the holder of a ‘contract right to cut,’ a taxpayer must have acquired under such contract a *proprietary interest* in the timber which he cuts. Compare *Helga Carlen v. Commissioner*, 220 Fed. (2d) 338 Where a taxpayer is granted a contractual right to cut and remove all or a described part of the merchantable timber on a particular tract of land, he has a proprietary interest in the timber cut by him *if at the time of the cutting he has an unrestricted right to sell the logs or use them in his trade or business*. If the circumstances are such that the grantor in fact takes for his own use or for sale on his own account substantially all of the logs cut, whether or not in the exercise of a right in the form of an option to purchase, the taxpayer-grantee will not be deemed to have an unrestricted right to sell logs or use them in his trade or business.” (Emphasis supplied).

Prior to the ruling, this Court had already confirmed that an unrestricted right to sell or use the logs was requisite for Section 631(a) benefits. *Carlen v. Commissioner*, 220 F.2d 338 (9th Cir. 1955). There, the taxpayers’ partnership acquired a right to cut timber, but agreed to sell all the logs to the owner of the timber. The Commissioner argued that the 1939 Code predecessor to Section 631(a) could not apply where the partnership did not have an unrestricted right to sell the timber or use it in its own business. This Court agreed. This Court again confirmed the need for an unrestricted right to sell or use the logs in *Ellison v. Frank*, 245 F.2d 837 (9th Cir. 1957). See also *Johnson*,

v. United States, 257 F.2d 530 (9th Cir. 1958).

In response to Seattle's requirement of a single logging operation, taxpayer and Scott united their Watershed timber in a joint venture arrangement under the 1946 contract admitted into evidence as Exhibit 2:

(i) *Equal contributions*. The parties agreed that their contributions to the venture would be equal. The possibility of inequality in their respective contributions of timber is dealt with by providing that the party contributing the lesser amount will purchase half the difference from the party contributing the greater amount at the 1946 stumpage values of \$1.00-\$7.00 per thousand fixed in the contract. (Exh. 2, Paras. I(a), at 2-3, and II(b), at 4-5).

(ii) *Equal sharing of risks*. The parties agreed to equal sharing of risks by assuming equal responsibility for costs, including costs of roads and Mountain Tree Farm Company's compensation. (Exh. 2, Paras. III, at 7-8, and VI, at 8; Exh. 3, Paras. II, at 5-6, and V, at 12-15). As a further refinement they adjusted the property tax burden, recognizing that taxpayer's timber was scheduled to be cut first so that, in the absence of an adjustment,

Scott would have been obliged to carry the tax burden for a greater number of years. (Exh. 2, Para. I(b), at 3-4) .

(iii) *Equal sharing of control.* The parties are assured of equal control over the cutting operation through their joint ownership of Mountain. (Pret. Ord., Para. 2(i), R. 7). Further, the contract admitted into evidence as Exhibit 3 gives them a joint supervisory right over Mountain. (Paras. I(a), at 2-3; III(a), at 7, and (d), at 9; IV (b), at 10, and (c), at 10-11; VI, at 15-16).

(iv) *Equal sharing of gains.* The parties have shared equally all gains which have accrued after the signing of Exhibit 2 in 1946. One source of such gains is appreciation of the standing timber (which is the gain described by Section 631(a)). It is apparent that *this gain inheres in the timber itself and can be realized only by the party which has the proprietary right to use the timber or sell it for its own account.* It is undisputed in this action that the Watershed timber was shared equally without regard to the land from which it came, and without restraint on its use or disposal. It follows, therefore, that the gains accruing by appreciation of the timber, following its contribution to the venture at the

1946 stumpage values of \$1.00-\$7.00 per thousand, were shared equally by taxpayer and Scott.²

Recall that the Section 631(a) formula for capital gain benefits is “fair market value” less basis. Thus, as timber appreciates, capital gain benefits increase. In other words, the gains shared equally by taxpayer and Scott gave rise to Section 631(a) benefits.³ Taxpayer contends that, just as risks, control, and gains have been shared equally since the venture started in 1946, so should the Section 631(a) benefits arising from the venture’s gains be shared equally.

Taxpayer’s difficulty is that Scott claims more than half the Section 631(a) benefits. We know of no plausible rationale for Scott’s claim. The Trial Court didn’t suggest one, and we don’t believe the government can either. It is true that, for the years in issue, the timber contributed to the venture by Scott constituted more than half the Watershed harvest. (Supp.

²Any gains which may have been realized by the contribution of the timber to the venture at prices of \$1.00-\$7.00 per thousand were, of course, for the account of the party making the contribution. In this regard, it should be understood that the provision of Paragraph IV of Exhibit 2 that each party will assume the risk of casualty losses to its own timber is not an exception to equal sharing of losses, because it can affect only appreciation in the timber accruing prior to formation of the venture in 1946. Loss of appreciation accruing in the timber during the life of the venture is necessarily shared equally by the parties by reason of their equal sharing of the harvests. In other words, if all Scott timber should be destroyed, Scott loses the \$1.00-\$7.00 per thousand at which the timber is to be contributed to the venture, but taxpayer and Scott are equal losers of the gains they would have shared from the timber’s appreciation over the 1946 stumpage prices.

³The way in which Section 631(a) benefits operate to mitigate tax liability is discussed, *infra*, IV.A (iii), pp. 29-35; see Appendix C, p. 43 for a summary of an example tax computation involving Section 631(a).

Pret. Ord., Para. 2(m), R. 12). Prior to signing Exhibit 2 in 1946, Scott, of course, held the proprietary interest in all its timber. Any gains accruing from appreciation in the timber up to that time could be realized only by Scott through its exercise of its proprietary right to sell or use the timber. But Exhibit 2 changed that situation. It committed half the Watershed timber to taxpayer regardless of the land from which it came. (Pret. Ord., Para. 2(h), R. 6). It was, in fact, an exercise of Scott's right to sell or use the timber. Exhibit 2 thereby terminated Scott's proprietary right to sell or use *any portion of Scott timber which happened to be included in taxpayer's half of the Watershed timber*. Thereafter, Scott had only the right to demand that taxpayer even up the contributions to the venture by paying Scott at the agreed \$1.00-\$7.00 rate for Scott's excess timber contribution. By the same token, taxpayer was committed to an equal contribution to the venture either in its own timber or in Scott timber acquired for cash at the \$1.00-\$7.00 stumpage rates. Taxpayer thereby assumed half the market risks and half the market opportunities. Necessarily, any gains to be realized, by appreciation after 1946 of taxpayer's half of the Watershed timber, were for taxpayer's account realizable solely through the exercise of taxpayer's proprietary right to sell or use the logs. To the extent that timber from Scott lands was included in taxpayer's half of the harvest, only taxpayer could realize the post-1946 gains from it. *It is solely the Section 631(a) benefits arising from these gains (i.e.*

gains from former Scott timber included in taxpayer's half of the harvest) which are at issue here. In other words, the Section 631(a) benefits claimed by taxpayer are solely those arising from gains *actually earned* by taxpayer from its half of the Watershed timber. Such gains, to the extent they were derived from timber acquired from Scott, were measured, for Section 631(a) benefit purposes, by ascertaining the timber's fair market value and then subtracting the \$1.00-\$7.00 stumpage payments, which taxpayer made to Scott.

We submit that it makes no sense for Scott to claim Section 631(a) benefits on gains which taxpayer earned. Further, it is contrary to the holdings of the Commissioner and this Court to claim Section 631(a) benefits unless one has the proprietary right to sell or use the timber producing the benefits. (Rev. Rul. 58-295 and *Carlen v. Commissioner, supra*). The benefits in issue here accrued *after* Scott had signed Exhibit 2, limiting its proprietary right to just half the Watershed timber and vesting the other half in taxpayer.

Scott predicates its case on its greater contribution of timber during the years in issue. Scott forgets that contributions to the venture were required to be equal. Under Exhibit 2, taxpayer had the right, and the duty, to make up any deficit in timber contribution by a cash payment to Scott at the 1946 \$1.00-\$7.00 stumpage prices. In other words, taxpayer was required to acquire enough timber from Scott to make

its contribution equal to Scott's. Accordingly, there is no justification for Scott claiming Section 631(a) benefits arising from gains which it did not earn and derived from timber which it could not sell or use.

III. Taxpayer, Acting through Mountain Tree Farm Company, Cut Its Half Share of the Watershed Timber.

The Trial Court has not explained how he reasoned to his decision. Even the vague reasons mentioned in his February 2, 1966, memorandum decision (R. 14) were substantially withdrawn in his April 20, 1966, Order Denying Motion for Reconsideration (R. 17). We are told only that the stipulated proof is "in even balance" so that "the ruling of the Commissioner under review should not be reversed" (R. 17).⁴ Consequently we must speculate about the Court's rationale.

Based upon the colloquy at trial and the Court's memoranda, we believe that the Court had no doubts about the validity of taxpayer's case to the extent discussed above. Rather, we have inferred that the Court was in some way concerned about the right to enter and cut in a literal sense, i.e. the right to wield the ax.

Of course, no corporation can cut timber or wield an ax in a strictly literal sense. Corporations are creatures of the law, dependent for their existence on scraps of paper properly signed and filed. Axes (or,

⁴The Trial Court's reliance on a "ruling" is misplaced, since the government has simply held open the returns of both taxpayer and Scott pending resolution of the dispute between them. See n. 1, *supra*, p. 12.

more modernly, chain saws) must always be wielded by real people. Yet the government will acknowledge that corporations, as well as individuals, may enter and “cut” timber within the meaning of Section 631(a). Even the Trial Court implicitly recognized the capacity of a corporation to “cut” timber. It is apparent from the Trial Court’s Memorandum Order Dismissing Action (R. 14) and Order Denying Motion for Reconsideration (R. 17) that it regarded a corporation, i.e. Mountain Tree Farm Company, as the party which “cut” the Watershed timber.

Why didn’t the Trial Court consider the timber to have been “cut” by the individuals who actually wielded the axes and saws? What was the basis for the Trial Court’s implicit assumption that Mountain Tree Farm Company, rather than real woodsmen, cut the Watershed timber? The answer is that actions of real people may, under certain circumstances, be imputed to other persons, including corporations. The Commissioner of Internal Revenue has established the rules for imputing the actions of an acting party to a taxpayer for tax purposes. In this appeal, we accept his rules without equivocation. The Commissioner will impute actions to a taxpayer whenever the following circumstances occur:

(i) *Benefit*. The taxpayer benefits from the actor’s actions.

(ii) *Risk*. The costs, and therefore the risks, of the actor’s actions are for the account of the taxpayer.

(iii) *Control*. The actor's actions are controlled by the taxpayer as to general purpose or result.

See the Commissioner's contentions set forth in this Court's decision in *Achong v. Commissioner*, 246 F.2d 445 (9th Cir. 1957), and the excerpts from the Commissioner's brief in the recent case of *H-H Ranch, Inc. v. Commissioner*, 357 F.2d 885 (7th Cir. 1966), contained in Appendix B to this brief. The Commissioner's rules are common sense rules. They would make sense to a businessman or anyone else accustomed to dealing in the practical affairs of the world. They are rules which are necessarily applied when any "act" of a corporation is involved. In the light of these rules, we can see why the Trial Court did not regard the woodsmen who actually cut the Watershed timber as having "cut" it for Section 631(a) purposes. It is apparent that the Court assumed the woodsmen to have been mere wage earners who received no benefit from the cutting (aside from wages), assumed no risk, and exercised no control. We agree (and believe the government will also agree) that, under the Commissioner's rules, the Trial Court's implicit reasoning was sound as far as it went.

Application of precisely the same rules will demonstrate that *taxpayer and Scott, not Mountain Tree Farm Company*, "cut" the Watershed timber within the meaning of Section 631(a):

(i) *Benefit*. The benefit from cutting timber is derived from the fact that timber which is felled,

bucked and delivered to the pond or dump is more valuable than timber still on the stump. If the value added to the timber by logging exceeds the cost of logging, a profit can be made on the operation. The Trial Court recognized that no woodsman working for wages could realize that benefit. What the Trial Court failed to appreciate was that neither could Mountain Tree Farm Company realize that benefit under the provisions of Exhibits 2 and 3. Such benefit inheres in the timber. It is necessarily realized by the party receiving and disposing of the timber. Mountain had a duty to deliver the Watershed timber to taxpayer and Scott. (Exh. 3, Para. IV(d), at 11-12). Mountain's position was the same as the individual woodsmen who wielded the axes. Mountain received no benefit from the cutting except its agreed compensation of 50¢ per 1,000 feet. (Exh. 3, Para. V, at 12-15). In short, Mountain was a mere wage earner. With respect to taxpayer's half of the Watershed timber, taxpayer benefitted exclusively from the ax wielding of the woodsmen.

(ii) *Risk*. The risk of cutting timber lies in the possibility that the cost of cutting, including roads, labor and equipment, may exceed the value added to the timber. The Trial Court rightly assumed that the woodsmen bore no part of this risk, but apparently failed to see that Mountain did not either. Pursuant to Exhibit 3, Mountain worked under a cost plus fixed compensation arrangement. Taxpayer and Scott were each obliged to pay half the costs of logging the Watershed timber, including

costs for roads and Mountain's compensation. (Exh. 2, Paras. III, at 7-8, and VI, at 8; Exh. 3, Paras. II, at 5-6, and V, at 12-15).

(iii) *Control*. "Control" has the same meaning with respect to timber cutting that it has in any other context. Neither the woodsmen nor Mountain had the right of control over the harvesting of the Watershed timber. Control over Mountain's cutting of the timber was shared equally by taxpayer and Scott. We have already seen that each owned half of Mountain's stock (Pret. Ord., Para. 2(i), R. 7) and that Exhibit 3 gave them a supervisory right over Mountain, which included control over the type of forest products cut (Para. I(a), at 2-3), the right to curtail or suspend production or to increase it (Para. III(a), at 7), the right to designate the areas for logging and the order in which such areas were to be logged (Para. III(a), at 7), the right to designate seed areas and to change such designations (Para. III(d), at 9), the right to specify delivery points (Para. IV(b), at 10), the right to direct the method of sorting and rafting logs (Para. IV(c), at 10), and "... the right to exercise general supervision . . . over the operations . . ." (Para. VI, at 15).

It seems clear that, under the Commissioner's rules for imputing actions to taxpayers, the cutting action by the woodsmen with respect to taxpayer's half of the Watershed timber cannot be imputed to Mountain. Mountain was a mere conduit through which the bene-

fit, risk, and control of cutting flowed directly to taxpayer and Scott.

Once it is understood that the cutting action by the woodsmen must be imputed to taxpayer and Scott for Section 631(a) purposes, the conclusion follows inescapably that taxpayer "cut" its half of the harvest. Obviously, the cutting of the *entire* harvest cannot be imputed to Scott—only the cutting of half. Scott enjoyed only half the benefit from the cutting of the Watershed timber (since it received only half the harvests), bore only half the risk (since it paid only half the costs) and exercised only half the control. The half of the cutting activity imputed to Scott should be that cutting which is attributable to the half of the timber which Scott received. In other words, only half of the cutting can be imputed to Scott, and that half is entirely absorbed by attribution to Scott's half of the harvest. Therefore, Scott did not cut taxpayer's half of the harvest, so that (with Mountain and its woodsmen eliminated from contention as mere wage earners) either taxpayer must be considered as having cut such timber, or we are left with the paradox that it was logged without having been "cut" by anyone.

The conclusion that taxpayer cut its half of the harvest is reinforced by the fact that taxpayer, by its receipt of such timber, was exclusively able to benefit from such cutting.

IV. There Are No Rational Alternatives to Taxpayer's Claim of Section 631(a) Benefits on Its Half of the Watershed Timber.

Before acquiescing in Seattle's request that they join in a single logging operation, taxpayer and Scott necessarily held, between them, all of the Section 631(a) rights with respect to their collective Watershed holdings. The government has acknowledged this by permitting them to claim Section 631(a) capital gain benefits on all such timber for the years 1946 through the years in issue. (Supp. Pret. Ord., Para. 2(j), R. 7). Consequently, taxpayer's claim to Section 631(a) benefits on its half of the Watershed timber can be supported by a demonstration that the only conceivable alternatives to its claim are manifestly unreasonable, i.e. that (i) Scott cannot reasonably claim such benefits, and (ii) the benefits should not be considered to have been lost by reason of the parties having acquiesced in Seattle's request for a single logging operation.

A. Scott Cannot Claim the Section 631(a) Benefits Arising Out of Gains Realized by Taxpayer from Its Half of the Watershed Timber.

Any one of three facts makes manifestly unreasonable a claim by Scott to Section 631(a) benefits on gains realized by taxpayer from taxpayer's half of the Watershed timber:

- (i) The first fact has been discussed in section II of this brief (*supra*, pp. 15-22). There, we called attention to the undisputed fact that taxpayer possessed the essential proprietary interest, i.e. an un-

restricted right to sell for its own account, or use in its trade or business, its half share of the Watershed timber. In fact, taxpayer used its half share in its manufacturing business. (Pret. Ord., Para. 2(h), R. 7). It follows that Scott is thereby excluded from enjoyment of that essential proprietary right with respect to taxpayer's half of the Watershed timber. The decisions of this Court in *Carlen v. Commissioner, supra*, and *Ellison v. Frank, supra*, unequivocally preclude a claim by Scott to Section 631(a) benefits with respect to gains which accrued from appreciation of such timber *after* it was committed to taxpayer under Exhibit 2.

(ii) Second, Scott cannot be considered to have "cut" taxpayer's half of the Watershed timber for the reasons stated in section III of this brief (*supra*, pp. 22-27).

(iii) A third reason why Scott cannot reasonably claim Section 631(a) benefits on gains realized by taxpayer from taxpayer's half of the harvest is that such a claim leads to a tax absurdity unprecedented in the tax law. To appreciate the absurdity, the capital gain computation provisions of the Internal Revenue Code of 1954, as applied to this case, must be considered.⁵ For this purpose, assume as a simple example that both taxpayer and Scott have \$1,000 of ordinary income, with deductions of \$900, resulting in \$100 of taxable income. At the effective corporate rates for the years in issue (52%), each would ex-

⁵An example tax computation with full explanation is set out in the text, pp. 29-35; for a one-page summary of the computation see Appendix C, p. 43.

pect to pay a tax of \$52 (ignoring the surtax exemption which does not appreciably affect the overall rates of large corporations):

	Taxpayer	Scott
Ordinary Gross Income.....	\$1,000	\$1,000
Less Deductions	— 900	— 900
	<hr/>	<hr/>
Taxable Income	100	100
Effective Tax Rate	x 52%	x 52%
	<hr/>	<hr/>
Tax	\$ 52	\$ 52

Now inject into the picture Section 631(a) gains. We have seen that such gains are measured by first ascertaining the fair market value of the timber on the first day of the year in which cut, and then subtracting basis. Assume an extreme case wherein all of taxpayer's former separate timber has been destroyed and harvests are *exclusively* from Scott timber. Assume a harvest of 5,000 board feet so that taxpayer's half would be 2,500 BF. Assume further a fair market value for the standing timber of \$47 per thousand (a realistic value for the years in issue). Taxpayer's payment to Scott (and thus taxpayer's basis) would be, under Paragraph II(b) of Exhibit 2, \$1.00 to \$7.00 per thousand BF. Taxpayer would realize at least \$100 of Section 631(a) gain on the cutting of the Scott former separate timber:

Fair market value of former Scott timber included in taxpayer's half of the Watershed harvest (2,500 BF at \$47 per M).....	\$117.50
Less stumpage paid Scott under Exhibit 2 (\$7.00 per M)	17.50
	<hr/>
Gain realized by taxpayer.....	\$100.00

It is the Section 631(a) benefits attributable to *this gain from former Scott timber, realized by taxpayer*, that taxpayer and Scott have both claimed. Note here that, while the *measure* of such gains, for the purpose of Section 631(a) benefits, is by reference to value at cutting, in the real financial world income is not realized, in fact, simply by sawing down trees. In the financial world, the tree, or the products manufactured from it, must be sold before gain is realized. The importance of this financial fact is that, since only taxpayer actually received its half of the Watershed timber and used it, only taxpayer can earn any real dollars from it to report in gross receipts. Scott, not having received taxpayer's half of the harvest, cannot sell or use it and thus cannot earn the gains in issue here.

All that Scott can earn in a financial sense are the gains from its *own half* of the harvest. If (to keep our example simple) we assume that Scott's cost for the timber was the same price charged to taxpayer (\$7.00 per M), then Scott's gain on its half of the harvest will also be \$100.⁶ Accordingly, taxpayer and Scott will *each* have their taxable income increased by \$100 (assuming no additional deductions) as a result of their Watershed venture:

⁶In n. 2, *supra*, we acknowledged that any gain Scott may have realized by contributing timber to the venture at \$1.00-\$7.00 per thousand is for Scott's account. Capital gain benefits from that gain are not in issue, so for simplicity's sake, the example assumes there is no such gain and concerns itself solely with gain realized after formation of the venture.

	Taxpayer	Scott
Ordinary Taxable Income.....	\$100	\$100
Gains from Respective Halves of Scott Former Separate Timber... 100		100
	<hr/>	<hr/>
Taxable Income	\$200	\$200

Note that, up to this point in the computation, capital gain income has been treated just like any other income. Section 61, defining “gross income,” does not distinguish between capital gain and ordinary income. A dollar of capital gain increases gross income exactly as does a dollar of ordinary income. In the case of *corporations*, this is also true of taxable income. A dollar of capital gain increases *corporate* taxable income just as much as does a dollar of ordinary income (because Section 1201, which allows individuals a deduction of 50% on capital gains, does not apply to corporations). However, ultimately, when the corporation reaches the point of calculating the tax to be paid on its taxable income, it receives a benefit for capital gains. Section 1201 (entitled “Alternative Tax” because it applies only if it imposes a lower overall tax than the other tax imposing sections of the Code) is the only section providing a capital gain benefit for corporations.⁷ In substance, it permits the corporation to extract, from

⁷Section 1201 provides, in pertinent part:

“Sec. 1201. Alternative Tax.

“(a) Corporations.—If for any taxable year the net long-term capital gain of any corporation exceeds the net short-term capital loss . . . there is hereby imposed a tax . . . of—

“(1) a partial tax computed on the taxable income reduced by the amount of such excess, at the rates and in the manner as if this subsection had not been enacted, and

“(2) an amount equal to 25% of such excess”

taxable income, all capital gains (including Section 631(a) gains) and pay a tax thereon at the rate of 25%. *Only the reduced balance of the taxable income is thereafter taxed at the regular corporate rate.* Applied to taxpayer in our hypothetical, Section 1201 will produce a tax of \$77:

An amount equal to 25% of the capital gain (\$100 x 25%)	\$25
A partial tax on taxable income (reduced by the amount of capital gain) at ordinary 52% rates (i.e. \$200 taxable income reduced by \$100 capital gain equals \$100 x 52%).....	52
	<hr/>
Tax	\$77

The above computation illustrates the corporate capital gain benefit in action. It serves, at the end of the tax computation, to shield capital gain income from ordinary tax rates and permits taxation at a 25% rate instead.

If taxpayer does not prevail here, and cannot apply Section 1201 to its gains realized from the Watershed venture, it cannot simply eliminate such gains from its taxable income. The gains were realized from the use of such timber and must be reported. No court can authorize the exclusion of such gains. All this Court can decide is whether taxpayer can report such gains at capital gain rates or must report them at ordinary rates. In the example, if taxpayer were to be denied the Section 631(a) benefits attributable to the gains it realized from the Watershed venture, taxpayer's entire taxable income of \$200 would be taxed at the 52% rate for a tax of \$104:

An amount equal to 25% of the capital gain
 (\$0 x 25%)\$ 0

A partial tax on taxable income (reduced by
 the amount of capital gain) at ordinary 52%
 rates (i.e. \$200 taxable income reduced by
 \$0 capital gain equals \$200 x 52%) 104

Tax\$104

Contrast taxpayer's situation with that of Scott. Scott has received only *half* the harvest timber and has, accordingly, been able to earn only *half* of the gains derived from appreciation over 1946 values. Thus, only *half* the gains are included in its taxable income. If Scott is allowed to claim Section 631(a) benefits with respect to *all* gains realized from its former separate timber, *as if it had earned all such gains*, the results, in our example, will be as follows:

An amount equal to 25% of the capital gain
 (\$200 x 25%)\$50

A partial tax on income (reduced by the
 amount of capital gain) at ordinary 52%
 rates (i.e. \$200 of taxable income reduced
 by *both* Scott's \$100 of capital gain *and*
taxpayer's \$100 of capital gain, equals
 \$0 x 52%) 0

Tax\$50

Thus, we see that, although only \$100 of capital gain was earned by Scott and included as part of its taxable income, Scott will claim \$200 of capital gain benefits *solely for the purposes of the Section 1201 computation*. Scott will have claimed Section 631(a) benefits on gains actually earned and included in taxable income by taxpayer. In other words, Scott will have

effectively split off the tax benefits from the tax liability, shifting the benefits to itself and leaving the liability to be borne by taxpayer at ordinary rates. Thus, although the example assumed that taxpayer and Scott had the same amount of ordinary income and the same amount of capital gain, Scott's tax is \$50, while taxpayer's is \$104. The government will concede, we believe, that the splitting of Section 631(a) benefits from the tax liability giving rise to such benefits is unprecedented in the tax law. Yet such is the absurdity which must follow if Scott is allowed to claim the Section 631(a) benefits arising out of all gains realized by the joint venture from Scott former separate timber.

B. The Section 631(a) Benefits Arising out of Gains Realized by Taxpayer from Its Half of the Watershed Timber Were Not Lost.

For the sake of completeness only, we mention here the possibility that the Section 631(a) benefits, which both taxpayer and Scott claim, may have been lost by the uniting of the taxpayer-Scott interests. The government has never asserted such a possibility. On the contrary, the government has each year acquiesced in the claiming by taxpayer and Scott of Section 631(a) gains on *all timber* cut in the Seattle Watershed. (Supp. Pret. Ord., Para. 2(j), R. 7). Throughout negotiations concerning the proper apportionment of such benefits between Weyerhaeuser and Scott, the government has indicated a willingness to agree to any apportionment acceptable to taxpayer and Scott.

Accordingly, we asserted before the Trial Court without opposition from the government:

“The government does not deny that someone has the right to treat plaintiff’s gains as realized under Sec. 631(a). The government is perplexed, however, because another party claims the same right with respect to the same gains. That other party is Scott Paper Company. As between plaintiff and Scott, the government is economically neutral. It is reconciled to one party successfully making the claim, but it does not wish to have both plaintiff and Scott do so. To protect itself against such a possibility, the government is taking Scott’s position in this action. If plaintiff prevails here, the government will take plaintiff’s position against Scott before another court.” (Plaintiff’s Opening Brief, at 12-13).

“ . . . It is important to remember, however, that the government has at no time contended that the arrangement resulted in the loss of Sec. 631(a) benefits on the watershed timber. The government acknowledges that, notwithstanding the arrangement, Weyerhaeuser and Scott, between them, hold all the requisite Sec. 631(a) rights. The problem this court faces is deciding the correct way to apportion Sec. 631(a) benefits on watershed timber.” (Plaintiff’s Post-Trial Brief, at 4-5).

For the three reasons mentioned in subsection IV. A above, we cannot believe that the Trial Court found any merit in Scott’s claim to the Section 631(a) benefits arising from taxpayer’s gains on taxpayer’s half of the Watershed timber. Since the only other alternative to a decision in favor of taxpayer is a conclusion that such benefits simply disappeared, we have been forced to inquire whether this was the Trial Court’s

unspoken conclusion. We submit that such a conclusion is manifestly unreasonable. First, there is no support for it in statute, regulation or case law. Second, it is completely unsatisfactory logically to conclude that Section 631(a) benefits which taxpayer and Scott undeniably held as owners of all the Watershed timber should have disappeared simply because they united their timber and logged jointly. Finally, it would be an inequitable paradox if the uniting of taxpayer-Scott holdings in the public interest should result in a tax penalty.

The government is obliged to defend this action in order to protect itself vis-a-vis Scott. However, to avoid the confusion which evidently troubled the Trial Court, we respectfully request that the government, in its answering brief, clarify its objectives. Does it seek a windfall for itself on a theory that the uniting of the taxpayer-Scott timber somehow caused the loss of Section 631(a) benefits which taxpayer and Scott had separately held before? If so, what is the rationale for the loss of the benefits? If the government claims no windfall for itself, is not this Court called upon to decide only whether it is taxpayer or Scott which has the superior claim to Section 631(a) benefits attribu-

table to gains realized by taxpayer from its half of the Watershed timber?

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 15th day of June, 1967.

JOHN T. PIPER,

Attorney

APPENDIX A
Table of Exhibits

Plaintiff's Exhibit No.	Record Reference Showing Admission as Evidence (page)
1 Cedar River Watershed Logging Agreement	8
2 Contract (Weyer- haeuser-Scott)	8-9
3 Logging Contract (Weyerhaeuser-Scott- Mountain Tree Farm)	9
4 Map of Cedar River Watershed, Disclosing Scott-Weyerhaeuser Holdings	9
5 Settlement of Stumpage Cut by Mountain Tree Farm (Dec. 31, 1957)	13

APPENDIX B

Excerpts From Commissioner's Brief in *H-H Ranch, Inc. v. Commissioner*, 357 F. 2d 885 (7th Cir. 1966)

[pp. 16-21, 23-24]

That a taxpayer may be engaged in the business of holding property "primarily for sale to customers in the ordinary course of its trade or business" through the use of an agent and that the sales activities of the agent for the benefit of the principal will be imputed to the principal cannot be disputed. . . .

* * *

The position of the taxpayer is premised upon the separateness for tax purposes of the corporate entities represented by H-H Ranch, Inc., and Blackhawk Builders. (Br. 7.) That taxpayer and Blackhawk are separate corporate entities for tax purposes is not questioned. The Commissioner contends, however, and the Tax Court held, that an agency relationship existed between H-H Ranch, Inc., and Blackhawk Builders. (R. 64.) Therefore, the activities of Blackhawk in regard to the subdividing of the Elgin Farm property must be imputed to the taxpayer.

[BENEFIT]

. . . If Blackhawk was to remit to taxpayer the value of the lots less the cost of improvements made by Blackhawk, it would appear to be evident that Blackhawk could make no profit on the subsequent sale of the lots to third parties. Any resulting profits would benefit H-H Ranch, Inc., only . . .

[CONTROL]

. . . If Blackhawk was not the agent of H-H Ranch, it would not have been necessary to indicate the purpose for which the realty was to be conveyed, as a seller ordinarily would not do so in a sales agreement.

[RISK]

The agreement also provided that when Blackhawk sold a lot to a third party with a house constructed thereon or when Blackhawk obtained a construction permit for the construction of a home on a lot to be sold by it to a third party, then and only then would Blackhawk pay H-H Ranch the sum of \$2,000 per lot. (R. 40-41.) Furthermore, any lots remaining unsold or unpaid for by Blackhawk at the end of five years were to be reconveyed to H-H Ranch, Inc., free and clear of all encumbrances. . . .

* * *

That the Tax Court was correct in its findings is apparent when it is realized that Blackhawk was under a contractual duty to pay for the lots only when they were sold to a third party either as a vacant lot or as a lot with a house constructed thereon. Thus, all the risks of a fall in the price level of realty in that area remained upon H-H Ranch, whereas Blackhawk was insulated from loss by the fact that no payment to H-H Ranch was required until the lot was sold. Thus, by refusing to sell the lots for less than \$2,000, coupled with the right to reconvey any unsold lots, Blackhawk could not possibly incur any loss.

. . . The Tax Court further pointed out that H-H

Ranch itself paid at least some of the expenses incident to the platting and zoning of the subdivision, a fact which the court found to be inconsistent with the ownership of the land by Blackhawk and consistent with its character as the agent of taxpayer. (R. 63-64.) The Tax Court was therefore clearly correct in holding Blackhawk to be the agent of taxpayer. [Commissioner's Brief, pp. 16-21, 23-24].

APPENDIX C

Summary of Example Tax Computation from Text,
pp. 29-35

1. Assumed Ordinary Income		Taxpayer	Scott
Ordinary Gross Income.....	\$1,000	\$1,000	
Less Deductions	— 900	— 900	
Taxable Income	100	100	
Effective Tax Rate	x 52%	x 52%	
Tax	\$ 52	\$ 52	
2. Taxpayer's Assumed Capital Gain			
Fair market value of former Scott timber included in taxpayer's half of the Watershed harvest (2,500 BF at \$47 per M)			
			\$117.50
Less stumpage paid Scott under Exhibit 2 (\$7.00 per M)....			
			17.50
Gain realized by taxpayer.....			\$100.00
3. Taxable Income		Taxpayer	Scott
Ordinary Taxable Income.....	\$100	\$100	
Gains from Respective Halves of Scott Former Separate Timber	100	100	
Taxable Income	\$200	\$200	
4. Correct Section 1201 Computation—Taxpayer			
An amount equal to 25% of the capital gain (\$100 x 25%).....			
			\$25
A partial tax on taxable income (reduced by the amount of capital gain) at ordinary 52% rates (i.e. \$200 taxable income reduced by \$100 capital gain equals \$100 x 52%).....			
			52
Tax			\$77
5. Erroneous Section 1201 Computation—Taxpayer			
An amount equal to 25% of the capital gain (\$0 x 25%).....			
			\$ 0
A partial tax on taxable income (reduced by the amount of capital gain) at ordinary 52% rates (i.e. \$200 taxable income reduced by \$0 capital gain equals \$200 x 52%).....			
			104
Tax			\$104
6. Erroneous Section 1201 Computation—Scott			
An amount equal to 25% of the capital gain (\$200 x 25%).....			
			\$50
A partial tax on income (reduced by the amount of capital gain) at ordinary 52% rates (i.e. \$200 of taxable income reduced by both Scott's \$100 of capital gain and taxpayer's \$100 of capital gain equals \$0 x 52%).....			
			0
Tax			\$50

Nos. 21834 and 21834-A

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WEYERHAEUSER COMPANY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

UNITED STATES OF AMERICA,

Appellant

v.

WEYERHAEUSER COMPANY,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

BRIEF FOR THE UNITED STATES AS APPELLEE
AND BRIEF FOR THE UNITED STATES AS APPELLANT

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OPINION BELOW

The District Court's memorandum orders dismissing action (R. 14-15) and denying reconsideration (R. 17-18) and the findings of fact and conclusions of law (R. 19-37) are not officially reported.

JURISDICTION

This appeal involves federal income taxes. The taxes in dispute for the years 1954, 1955, 1956 and 1957 were paid as follows: \$16,324.88, plus interest of \$4,159.04 on November 9, 1962, and \$439,077.68, plus interest of \$181,727.78 on November 4, 1963. (R. 20.)

Claims for refund were filed on May 27, 1964, and were rejected on October 2, 1964. (R. 20.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on June 3, 1965, taxpayer brought this action in the District Court for the recovery of the taxes paid. (R. 20.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The District Court's pretrial order identified two issues labeled therein "First Question Presented" and "Second Question Presented". (R. 3-9.) The two questions were unrelated factually and legally. The District Court determined the "First Question" for the taxpayer and the "Second Question" for the Government. (R. 22, 36.) The judgment of the District Court for the taxpayer in the amount of \$257,957.70 was entered on December 21, 1966. (R. 38-39.) Within sixty days thereafter, on February 16, 1967, notice of appeal was filed by the taxpayer. (R. 41.) On the same day the United States filed a notice of appeal. (R. 40.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

Because of the distinct nature of the issues each will be discussed in a separate brief under the same cover.

QUESTION PRESENTED

Whether taxpayer "owns" or "has a contract right to cut" one-half of the timber growing on the

land of the Scott Paper Company' so as to be entitled under the provision of Section 631(a) of the Internal Revenue Code of 1954, to treat the cutting of that timber as a sale or exchange thereof.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set out in Appendix A, *infra*.

STATEMENT

The Government accepts the facts as stated in taxpayer's brief (pp. 3-12) except that the Government does not concede that taxpayer had any property interest in Scott's timber before it was cut. (Compare Taxpayer's Br. 5, 9, 10, 11.) This is essentially the issue to be decided by the Court of Appeals.

SUMMARY OF ARGUMENT

To qualify to elect "sale or exchange" treatment for appreciation to timber, Section 631 of the Internal Revenue Code of 1954 requires that a taxpayer be the owner or have a "contract right to cut, such timber." The contractual relations here provided for the pooling of logs and forest products to be harvested by a third party from the timber owned by the taxpayer and

¹ Scott Paper Company is the successor in interest to the Soundview Pulp Company. (R. 22.) Both companies will be referred to as "Scott".

Scott. Such pooling of logs and forest products does not qualify under Section 631. An analysis of the contracts clearly shows that taxpayer was never the owner, nor had a contract right to cut Scott's timber.

ARGUMENT

THE TAXPAYER IS NOT ENTITLED TO THE BENEFITS OF SECTION 631 SINCE IT WAS NEITHER THE OWNER OF, NOR HAD A CONTRACT RIGHT TO CUT, TIMBER ON SCOTT'S LAND

To qualify for its benefits, Section 631(a) of the Internal Revenue Code of 1954 (Appendix, *infra*) requires that a taxpayer own or have a "contract right to cut, such timber." There is no dispute that Scott, not the taxpayer, was the owner of the timber on Scott's land. In fact in the agreements of January 21, 1946 between taxpayer and Soundview (Scott's predecessor), and taxpayer, Soundview and Mountain Tree Farm Company, it was expressly provided that each of the parties would remain the owner of its own timber. (R. 25, 27, 29; Exs. 2, 3.)

Taxpayer, however, misconstrues the purpose of the 1946 agreements (R. 23-34; Exs. 2, 3), and the contractual relationships of the parties ensuing therefrom. The agreements did not, as taxpayer contends (B4. 22-27), grant to each party a legal right to cut

any timber of the other but instead provided for joint logging operations, a pooling of "all logs and other forest products," and delivery of one-half thereof to each party (R. 23). Nowhere in the forty-two pages comprising the three agreements does there appear any language purporting to give the taxpayer a right itself to enter on Scott's land and cut timber, although they were executed three years after the provision here in issue was enacted into the tax law in 1943 by adding Section 117(k) to the Internal Revenue Code of 1939, the predecessor of Section 631 of the 1954 Code. 3B Mertens, Law of Federal Income Taxation (Rev.), Section 22.128. If the taxpayer had so intended it could easily have drafted the agreements so as clearly to avail itself of the tax benefits of this section of the Code. Further more, under the law of the State of Washington, which definitely distinguishes between standing timber as realty, and cut logs as personalty, the proper way to grant an interest in timber, or right to cut, is by formal deed, not in contractual instruments such as are involved here. In *Coleman v. Layman*, 41 Wash. 2d 753, 252 P. 2d 244, the court said, at page 756.

Growing timber can be conveyed separately from the land on which it grows. Such a conveyance, with the right to enter upon the land and remove the timber in the future, either within a stated or a reasonable time, is the conveyance of an in-

terest in realty and is *properly done by deed*. See *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 192 Wash. 1, 22 72 P. (2d) 311 (1937), and cases cited. (Emphasis added.)

In accord: *Groenveld v. Dean*, 40 Wash. 2d 109, 241 P. 2d 443. If the parties, two of the largest holders of timber in the Seattle Watershed (R. 22), had intended to convey interests in timber it seems that they would have used documents proper for that purpose.

Actually there was no reason to exchange interests in timber. The parties contracted because of the insistence of the City of Seattle that their logging operations be contracted jointly. This was accomplished through the use of a single logger for both parties, and equal division of the logs and forest products harvested between them. The right of the logging company which performed the joint logging operation to enter upon the respective lands of Scott and the taxpayer and to cut timber therein was conferred upon it by the respective owners of those lands. The equal division made necessary the provisions for payments to compensate for any imbalance in logs and forest products taken from the timber of the two parties. No actual rights in the standing timber of each other was needed.

In the 1946 agreements the parties expressly stated their purpose to be to deliver one-half of the logs

and other forest products to each of the parties. The Agreement between the taxpayer and Scott of January 21, 1946 states (R. 24; Ex. 2):

It is the desire of the parties hereto that their agreements concerning the prices to be charged and paid *for logs and other forest products* delivered to one party from the timber of the other, and their other agreements with respect to the logging, delivery and payment of and *for logs and other forest products* to be removed from *their respective tracts of timber* be set forth at length. (Emphasis added.)

That the parties contracted for delivered cut logs and forest products, not with respect to interests in standing timber, is further supported by the parties' own characterization of their logging contract with Mountain Tree, the "Operator" (R. 23; Ex. 2):

* * * whereby the parties hereto have agreed that the Operator shall, and it has agreed to cut and remove so much of said *timber of each of the parties* * * * and whereby the Operator shall and will deliver one-half of all *logs and other forest products* so removed to each of the parties hereto." (Emphasis added.)

The logs were to be transported by the operator to the log dump of a designated boom company where they were to be sorted, rafted and scaled, after which they were to be delivered to the parties. The other forest products were to be delivered by the operator to points specified by each company. (R. 33-34; Ex. 3.)

Clearly the sale of interests in the standing timber was not intended. The agreements are quite specific in referring to "timber" when they mean the forest growth from which marketable forest products can be produced, and to "sawlogs", "pulp wood", and "other forest products" when referring to the material produced in the harvesting operation. (R. 29-30; Ex. 3.) It was the latter for which the parties contracted.

The substantial incidents of ownership which each party retained in its own timber are at odds with a transfer of a proprietary interest to the other party (cf. Taxpayer's Br. 15-22):

1. Each party retains title to its own timber and the logs until delivered. (R. 25; Ex. 2.) After cutting the logs were branded with the mark of the timber owner which evidenced its continued ownership. (R. 33; Ex. 3.) Cf. *State v. Tullock*, 118 Wash. 496, 203 Pac. 932. Title did not pass until the logs were actually delivered to the respective parties.

2. Each party retained the risk of damage and of destruction of its own timber by fire or other causes. If any timber were so destroyed, or taken by eminent domain, the owner of the timber was permitted to recover and retain the proceeds and compensation "free from any claim of the other party thereto." (R. 28; Ex. 2.)

3. Each party was to pay the property taxes and charges for fire protection on its own timber except that after 1970, by which year taxpayer's timber was to be completely removed, taxpayer agreed to pay one-half of the taxes and charges in Scott's remaining timber. (Ex. 2, pp. 3-4, par. I(b).)

The joint ownership and control of the logging company, Mountain Tree, by taxpayer and Scott was necessary for the joint logging operation, and for the pooling and equal division of the cut logs and forest products between the parties. It does not establish that Mountain Tree was exercising a cutting right of the taxpayer when it cut Scott's timber. (Cf. Taxpayer's Br. 22-27.)

In fact the logging contract expressly negates that Mountain Tree was the agent for either party. The right to cut the entire watershed timber was vested exclusively in Mountain Tree and neither taxpayer nor Scott retained such rights.² (R. 30-32; Ex. 3, pp. 15-16, par. VI.)

In the context of the three agreements (Exs. 1, 2, 3) the provisions in Article II(b) of the contract between taxpayer and Scott for specified "stumpage"

² Of course Mountain Tree, the logger, was not given a "contract right to cut" qualifying it for Section 631 benefits since it had no unlimited right to dispose of the cut timber. Cf. *Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th); *United States v. Johnson*, 257 F 2d 530 (C.A. 9th).

payments for logs were not made for timber. (R. 25-26; Ex. 2). These payments were required to equalize the contribution of each party to the cost of logs produced from the timber of both companies. It was not a payment for any specific quantity of timber. It was needed because the values of the logs vary by species and location. A payment would be required, for example, if equal quantities of logs were cut and delivered from the timber of each company but the value, at the agreed prices, produced from Scott's timber exceeded that produced from taxpayer's. It is noted that for hemlock pulpwood the agreed price is expressed fifty cents "per cord of 128 cubic feet" indicating that the payments were for "cut wood." (R. 25-26; Ex. 2.)

Taxpayer's principal contention (Br. 14-22) appears to be that since taxpayer, by reason of the 1946 agreements, obtained the benefits of the appreciation in value of Scott's timber after that date it should be allowed the benefits of Section 631 of the Internal Revenue Code. As we have shown, taxpayer does not qualify under Section 631. It should, more fittingly, address its complaint to Congress in a request for legislative correction than to seek, as it does here, to have this Court misapply the existing statute to the facts in this case.

Under the 1946 agreements all taxpayer had, as

we have shown, was a right to the delivery of one-half of the logs produced from Scott's timber in exchange for one-half of the logs produced from its own timber, plus equalization payments for any excess from either. The fact that the agreements ultimately enabled it to profit from appreciation in Scott's timber gave it no proprietary interest in the timber itself. The same advantage would equally result from any long-term contract for the purchase of logs at a fixed price. Surely the taxpayer would not contend that, e.g., a paper manufacturer on the East Coast who had in 1946 contracted with Scott for the delivery to it there in a later year, but at a fixed price, of a quantity of logs, or other forest products, after having been cut by Scott from timber on Scott's land in Washington, would be entitled to the benefits of Section 631, merely because the value and going price of such logs, etc. had increased in the interim. The taxpayer is in no different position. Its error is in seeking to make the fact that it stood to gain from an increase in the value of the logs, etc., which it might receive under the contracts the sole determinant of eligibility under Section 631,³

³ In making it necessary, in order that a taxpayer qualify under the statutory term "contract to cut," that the taxpayer have the right to cut timber for its own account, or to use the cut timber in its own business, Treasury Regulations on Income Tax (1954 Code), Sec. 1.631-1(b)(1), and the decisions of this court in *Carlen v. Commissioner*, 220 F. 2d 338, and *United States v. Johnson*, 257 F 2d 530, do not purport to void the primary requirement that taxpayer actually have the prerequisite contract right to enter and cut the timber in question nor to extend the statute so as to cover those who have merely a right to receive logs at a contract price less than the market rate at the time of delivery.

while ignoring the fact that the statute clearly limits those benefits to those who occupy the legal status of owner, or who have a "contract right to enter and cut".

The judgment of the District Court should be affirmed as to the Section 631 issue.

No. 21,834-A

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BRIEF FOR THE UNITED STATES
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QUESTION PRESENTED

Whether the taxpayer is required to set off casualty losses against gains subject to Section 1231 of the Internal Revenue Code of 1954, or may deduct them as ordinary losses under Section 165 of the Code.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra*.

¹ The "Opinion Below" and "Jurisdiction" are the same as in the Brief For The United States as Appellee, *supra*.

STATEMENT

During the years 1954, 1955, 1956 and 1957, taxpayer suffered certain losses of property. The losses included destruction of timber, plant facilities, machinery, equipment and offices, all of which had been held for appropriate utilization in the taxpayer's business for more than six months. They were variously caused by fire, storms, blasts, beetles and hurricanes. The amounts of the losses were as follows (R. 21):

<i>Year</i>	<i>Amount of Loss</i>
1954	\$185,903.28
1955	164,066.05
1956	131,716.00
1957	195,225.00

The losses were not insured. Taxpayer took the position on its returns and claims for refund that they were deductible from ordinary income under Section 165 of the Internal Revenue Code of 1954. On audit of taxpayer's returns, the Internal Revenue Service took the position that the losses were subject to Section 1231 (a) of the 1954 code and, therefore, because taxpayer's gains subject to Section 1231(a) exceeded its losses subject to that section (exclusive of the aforesaid casualty losses) by amounts greater than the sum of the casualty losses for each of the years in issue (R. 21-

22), were deductible only as capital losses, as provided in Section 1231(a).

The District Court concluded that the taxpayer is not required to apply the losses in question to gains subject to Section 1231 of the 1954 Code but may deduct the losses as ordinary losses under Section 165. (R. 22.)

SPECIFICATION OF ERROR RELIED UPON

The District Court erred in concluding that taxpayer's uninsured casualty losses need not be applied against Section 1231 gains under Section 1231 of the Internal Revenue Code of 1954, but may be deducted as ordinary losses under Section 165 of the Code.

SUMMARY OF ARGUMENT

By reason of the definition contained in subsection (2) of Section 1231(a) of the Internal Revenue Code of 1954, all casualty losses incurred by a taxpayer during years prior to 1958 are treated as involuntary conversions which by that section of the statute are required to be set off against capital gains. This construction of the statute is consistent with the expressed understanding of Congress which, in 1958, amended the law for subsequent years, and longstanding Treasury Regulations. It has been approved by three courts of appeals. *Morrison v. United States*, 355

F. 2d 218 (C.A. 6th), certiorari denied, 384 U.S. 986; *Chewning v. Commissioner*, 363 F. 2d 441 (C.A. 4th), certiorari denied, 385 U.S. 930; *Campbell v. Waggoner*, 370 F. 2d 157 (C.A. 5th). The only appellate authority to the contrary is the decision in *Maurer v. United States*, 284 F. 2d 122 (C.A. 10th), the demonstrable errors of which stem from a fundamental misconception of (1) the relationship between Section 165 allowing the deduction of casualty losses and Section 1231 which requires, as a matter of computation, that such losses be set off against Section 1231 gains for the years prior to 1958, and (2) a refusal to give effect to the mandate of the statute that a loss from destruction (casualty) be deemed an involuntary conversion.

ARGUMENT

TAXPAYER'S UNINSURED CASUALTY LOSSES MUST BE OFFSET AGAINST ITS GAINS AS PROVIDED IN SECTION 1231 OF THE INTERNAL REVENUE CODE OF 1954.

A. *The statute and authorities require the offsetting*

In holding that taxpayer's wholly uninsured casualty losses, incurred to its timber, and other business property, prior to 1958, were deductible in full and need not be set off against taxpayer's Section 1231 gains (R. 22), the District Court did not follow the requirement of Section 1231(a) of the Internal Revenue

Code of 1954 (Appendix, *infra*). This statute constitutes in substance a provision that where gains on sales or exchanges of property used in trade or business, plus gains from involuntary conversions of property used in trade or business and capital assets held for more than six months exceed the recognized losses from such sales, exchanges and conversions, then these gains and losses are to be treated as though they were gains and losses from sales or exchanges of capital assets held for more than six months. In such event, the losses are not treated as ordinary losses, but serve to reduce the amount of capital gains. On the other hand, the statute further provides, if such gains do not exceed such losses (i.e., from sales, involuntary conversions, etc., of capital assets), such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets; i.e., the gains are treated as ordinary income and the losses are allowed as ordinary losses.

Especially pertinent to the present case involving wholly uninsured losses is the provision of Section 1231 (a) (2) that losses upon the destruction, in whole or in part, of property used in the trade or business shall be considered losses from an involuntary conversion to which the netting provisions of the statute apply. This subsection provides:

(2) losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

This subsection (2) completely refutes any contention taxpayer may make that Section 1231(a) does not apply here on the ground that the uninsured losses were not converted into other property and were not "involuntary conversions" within the intendment of that statute. Congress clearly directed that for the purpose of application of Section 1231(a) and in determining whether or not gains exceed losses, or vice versa, losses upon destruction of property used in the trade or business or capital assets held for more than six months should be considered losses from a compulsory or involuntary conversion both when the property is converted into other money or property (as in the case of insurance), or whether, as here, no compensation is received for the losses. It is evident from the express definition of Section 1231(a)(2) that where a loss is sustained, when property used in the trade or business or a capital asset is destroyed in such manner as to be deductible loss under Section 165(a) (Appendix, *infra*), it is to receive the same treatment as would a similar loss if compensation were made in part from insurance or some other source.

Moreover, the legislative history of Section 1231 (a) in years subsequent to the tax years 1954 through 1957, here involved, strongly evidences that the District Court's construction of Section 1231 is correct and that casualty losses upon destruction of property are to be taken into consideration under the terms of that statute as a compulsory or involuntary conversion even though the taxpayer is not compensated by insurance in any amount. Section 49(a) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, effective for years after December 31, 1957, added the following sentence at the end of Section 1231(a):

In the case of any property used in the trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect of which the taxpayer *is not compensated for by insurance in any amount*, arising from fire, storm, shipwreck, or other casualty, or from theft. (Emphasis added.)

Plainly this amendment would have been completely unnecessary if taxpayer's contentions were correct. Congress could have regarded the amendment as necessary only because it interpreted Section 1231, as it existed before amendment, to require the inclusion of otherwise covered losses under Section 1231 even though not compensated by insurance in any amount. Indeed, this interpretation is specifically expressed in

the report of the Senate Committee on Finance, which recommended the enactment of the amendment (S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 74-75, 203-204 (1958-3 Cum. Bull. 922, 995-996, 1124-1125)):

Under present law *where there are uninsured losses on property* as a result of its destruction, theft, seizure, requisition, or condemnation, such losses, in the case of property used in the trade or business or capital assets held for more than 6 months, are treated as section 1231 losses. * * *

Where a taxpayer elects to be a self-insurer against casualty losses, *there seldom is a conversion into money or other property*, as there would be if the destroyed property were insured. If this casualty loss were the only loss incurred during the taxable year by the self-insured person he would be entitled to the full benefit of an ordinary loss deduction under section 1231, but where there are also 1231 gains, the casualty loss is partially or wholly offset against these gains which would otherwise be taxed as capital gains. * * *

Under section 1231, *uninsured casualty losses on depreciable property or real estate used in the trade or business or on capital assets must be aggregated with various other types of section 1231 gains and losses.* * * * (Emphasis added.)

In addition to the above considerations, the applicable Treasury Regulations on Income Tax (1954 Code), Section 1.1231-1(e) (Appendix, *infra*), provide explicit supporting authority for the Government's position. Prior to the 1958 amendment to the statute,

the pertinent portion of the regulations read as follows (T.D. 6253, 1957-2 Cum. Bull. 547, 551);²

(e) *Involuntary conversion*.—For purposes of section 1231, the terms “compulsory or involuntary conversion” and “involuntary conversion” of property mean the conversion of property into money or other property as a result of complete or partial destruction, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof. Losses upon the complete or partial destruction, theft, seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion *whether or not there is a conversion of the property into other property or money*. For example, if a capital asset held for more than 6 months, with an adjusted basis of \$400, is stolen, and the loss is not compensated for by insurance or otherwise, section 1231 applies to the \$400 loss. (Emphasis added.)

As seen, its exposition of the coverage of the statute is precisely that stated by the Senate Committee in its 1958 report, *supra*. Moreover, this same application of the law was embodied in the prior Regulations under the 1939 Code,³ this being the consistent posture of the Regulations back as far as 1943,⁴ the year after the initial 1942 enactment of the statutory provision. This

² Although issued in 1957, these Regulations were expressly made effective for years beginning after December 31, 1953.

³ Treasury Regulations 103 (1939 Code), Section 19.117-7; Treasury Regulations 111 (1939 Code), Section 29.117-7; Treasury Regulations 118 (1939 Code), Section 39.117 (j)-1(a) (2).

⁴ See Treasury Regulations 103 (1939 Code), Section 19.117-7, as added by T.D. 5217, 1943 Cum. Bull. 314.

long-standing and consistent position, which has weathered the passage of 26 years, three amendments to Section 117(j) of the 1939 Code,⁵ and the re-enactment of Section 117(j) of the 1939 Code as Section 1231 of the 1954 Code and which was ratified by the Congress, for years prior to 1958, in both the statutory language of the 1958 amendment, made effective only for later years, and the supporting Committee Report, takes on the character of established law. As stated by the Supreme Court in *Lykes v. United States*, 343 U.S. 118, 127:

Such a regulation is entitled to substantial weight [citing cases]. Since the publication of that Treasury Decision, Congress has made many amendments to the Internal Revenue Code without revising this administrative interpretation of Section 23(a) (2) [citing cases].

And, in *Helvering v. Winmill*, 305 U.S. 79, 83, it said:

Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.

In accord: *United States v. Correll*, decided December 11, 1967 (36 U.S. Law Week 4055).

It should be noted that the Congress not only re-

⁵ See Section 127(b), Revenue Act of 1943, c. 63, 58 Stat. 21; Section 210(b), Revenue Act of 1950, c. 994, 64 Stat. 906; Sections 322(c)(3), 323(a)(1), 324 and 325(a), Revenue Act of 1951, c. 521, 65 Stat. 452.

enacted the statute without change in the 1954 Code but in making the 1958 amendment which, for years thereafter, provided a different treatment of wholly uninsured losses to business property, expressly recognized and construed the pre-amendment version of Section 1231(a) as including such losses and as requiring amendment in order that they be excluded for subsequent years. Pursuant to that statutory amendment, the Treasury Department amended Section 1.1231-1 (e) of its Regulations (by T.D. 6394, 1959-2 Cum. Bull. 186) so as to give effect to the special exclusion from coverage under Section 1231 of uninsured casualty losses, *incurred in years ending after 1957*, to property used in the business or held for the production of income, but, consistently with the provision of the statute, and the flat statements of the supporting Committee Report, retaining the inclusion of uninsured losses to such assets in prior years, such as those before the Court. Surely, the law could not be more clearly or authoritatively established.

The Government's position that all casualty losses in years prior to 1958 must be set off against Section 1231 gains, irrespective of whether the assets were insured or not, has been accepted by three federal courts of appeal. *Morrison v. United States*, 355 F. 2d

218 (C.A. 6th), certiorari denied, 384 U.S. 985;⁶ *Chewning v. Commissioner*, 363 F. 2d 441 (C.A. 4th), certiorari denied, 385 U.S. 930; *Campbell v. Waggoner*, 370 F. 2d 157 (C.A. 5th). Although these cases involved years subject to the 1958 amendment (Section 49, Technical Amendments Act of 1958, Appendix, *infra*), that amendment was not applicable to the fact situations there since the assets involved were nonbusiness and personal. The instant taxpayer can prevail only on the theory that all wholly uninsured losses were excluded from the pre-amendment statute (which made no distinction between business and personal assets). The answer to that question necessarily controlled the issue before the Fourth, Fifth and Sixth Circuits in the cited cases since the tax treatment of losses to personal assets (there in issue) was not changed by the amendment. Accordingly the decisions are authoritative as to the construction of Section 1231 (on the point relied on by taxpayer) in the pre-amendment years involved in this case. Each of the three cited opinions disapproved of the sole appellate case which may be relied upon by the taxpayer and whose errors will be discussed *infra*, *Maurer v. United States*, 284 F. 2d 122 (C.A. 10th). The taxpayer may also cite the unappeal-

⁶ Following *Morrison*, the Court of Appeals in the Sixth Circuit also reversed two lower court decisions based on *Maurer*, discussed in text: *Killebrew v. United States*, decided August 3, 1966 (18 A.F.T.R. 2d 5572), and *Hall v. United States*, decided August 3, 1966 (18 A.F.T.R. 2d 5572).

ed district court opinion in *Oppenheimer v. United States*, 220 F. Supp. 194 (W.D. Mo.) which, without independent analysis, merely followed *Maurer* on the stated belief that it was bound thereby.

In successfully opposing petitions for certiorari by the taxpayers in *Morrison* (No. 1241, October Term, 1965), and *Chewning* (No. 478, October Term, 1966) cases, the Government pointed out that the language of the statute as amended in 1958 (and involved in those cases) was materially different than that prior to the amendment (as involved in *Maurer* and the instant case) and that, therefore, regardless of what the pre-amendment law had covered, it was not necessary for the Supreme Court to resolve any possible conflict with *Maurer* since in each case before it was the post-amendment statute that concededly governed and there was no conflict as to the meaning and coverage of the amended statute.

It was also of importance that, with respect to future litigation, only the proper construction of the post-1958 statute would be of continuing significance since there could be only a few isolated cases still open which would come under the pre-amendment statute. Since there was no question, and uniform agreement of the appellate courts, that Congress had clearly provided in the amended statute, and in the accompanying

Committee Reports, *supra*, that wholly uninsured casualty losses to personal property in years covered by the amendment were included in the Section 1231 computation, consideration of the apparent conflict between *Maurer* and the other decisions could determine only whether *Maurer* had correctly construed pre-amendment law—i.e., whether (1) had the effect of excluding the amendment of uninsured losses to business properties which had theretofore been included in the pre-1958 law (as the Government contended), or (2) as would be the case if *Maurer* was correctly decided, it had included uninsured losses to personal property which had theretofore been excluded.

In the instant case, involving pre-amendment law, it becomes necessary to resolve that conflict in order for this court to reach the correct result. In this connection, we point out, in addition to the clear expressed view of the Fourth, Fifth and Sixth Circuits that *Maurer* had erred as to the coverage of Section 1231, the following two significant considerations:

1. The language of the pre-amendment statute upon which the advocates of the *Maurer* result solely rely (“into other property or money”) appears unchanged in any way in the amended statute. It cannot be reasonably said to exclude uninsured losses from the former while not having that effect in the latter.

2. As previously noted, the pertinent Treasury Regulations clearly provide for the result here urged by the Government. They must be given effect unless it be deemed that they are invalid because in conflict with the clear intent of the statute. This, in turn, can only be the case if this Court is able to conclude that inclusion of the phrase in question (into other property or money) leaves no possible construction other than an intended exclusion of wholly uninsured losses. Yet, it must be noted that the Congress which enacted the 1958 amendment did not feel that, in order to accomplish their expressed purpose of *including* uninsured losses to personal property under Section 1231, it was necessary to eliminate that phrase. Consequently, it can scarcely be said that no Congress could regard that language as failing to exclude wholly uninsured losses. For that reason, we submit, the Regulations are clearly valid.

B. *The Maurer opinion was erroneous*

As noted the taxpayer may rely on *Maurer v. United States*, *supra*, the rationale of which has been uniformly rejected by three other courts of appeal. *Morrison v. United States*, *supra*; *Chewning v. Commissioner*, *supra*; *Campbell v. Waggoner*, *supra*. *Maurer* was a completely erroneous decision, not only because of the Tenth Circuit's failure to consider the

Congressional views reflected in the significant 1958 developments, but because of the chain of other basic errors and *non sequiturs* upon which that decision rested (which were pointed out to the appellate courts which have expressed disagreement with *Maurer*), and which we will now discuss in the order in which they appear in that opinion.

The Tenth Circuit (p. 123) commenced its discussion by expressing the view that Sections 165 and 1231 are mutually exclusive. This is incorrect and the court's misunderstanding led to subsequent errors (see *infra*). First, Section 1231 does not include in gross income any receipts which do not have that status by force of other provisions of the statute, nor does it make deductible any losses which are not already deductible under other sections. This is expressly stated in Section 1231(a)(1), which provides that gains shall be included in the computation only to the extent taken into account in computing gross income and losses only to the extent taken into account in computing taxable income. See also Treasury Regulations on Income Tax (1954 Code), Section 1.1231-1 (d) and (g), Example 3 (Appendix, *infra*). Section 1231 merely provides special additional benefits in the form of reduced tax rates (capital gain rates) for certain items of income—namely, the proceeds of sales or exchanges of business

property and of the involuntary conversion of business property or of capital assets held for more than six months (providing, of course, they exceed the losses from such sources). It will be noted that Section 1231 specifies only that if gains of the specified types exceed losses they "shall be considered as gains or losses from sales or exchanges of capital assets held for more than six months," whereas if the losses are the greater "such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets." Thus, this section purports to do no more than determine whether the specified types of gains or losses (here, casualty losses to business property) shall be deemed capital in nature, or ordinary. In order to be *deductible* (whether at capital or ordinary rates) they must first be made so by Section 165. Section 1231 does not, in actuality, convert any losses to capital losses but merely uses those defined in Section 1231 as a measure of the amount of Section 1231 gains which do not need, and should not be given, the special relief treatment as capital gains. Thus, there is no conflict between Section 165 and Section 1231, and inclusion of casualty losses in the Section 1231 computation does not take them out of the coverage of Section 165. They are included in the Section 1231 computation only *because* they are allowable as deductions under Section 165.

2. After recounting with substantial accuracy the historical purpose of Section 1231 and the fact that it provides capital gain treatment for net gains and ordinary loss treatment for net losses, the court observed (p. 124) that "Viewed in this light" it was clear that Section 1231 was aimed at compensated losses, with uncompensated losses left to Section 165. The predicate does not lead to that conclusion nor has any tendency to support it. Neither the exclusion nor the inclusion of uncompensated losses under Section 1231 would alter or affect in any way the recited purposes of the provision or the scheme of the netting computation, and the court's conclusion was erroneous.

3. Next, the court observed (p. 124) that, with respect to an insured property, the taxpayer is compensated by the insurer and the "loss reduced proportionately". It then concluded that "it seems to follow" that an uncompensated loss should be allowed an ordinary deduction. This, of course, is another *non sequitur* and seems to be based upon the court's unspoken but necessary assumption that a loss not reduced by insurance comes under Section 165, while one partially compensated does not. But, as shown, every casualty loss must qualify under Section 165 *before* it can qualify under Section 1231. Moreover, it is well established that the loss deductible under Section 165

is the amount of the loss *reduced by the amount of insurance received*. I.T. 4032, 1950-2 Cum. Bull. 21 (see particularly the examples given, p. 22) ; *Kraus v. Commissioner*, decided October 31, 1951 (P-H Memo T.C., par. 51,327; 3 Rabkin & Johnson, Federal Income, Gift & Estate Taxation, Section 41.03, p. 4121a). Since, therefore, both partially insured and wholly uninsured casualty losses are equally covered by Section 165, it cannot "follow" that one or the other is thereby removed from the coverage of Section 1231. We suggest that the Tenth Circuit was misled, throughout its opinion, by the reference in Section 165(a) to losses "not compensated for by insurance or otherwise." It would seem that it took this to refer to losses where there was no insurance recovery at all rather than to that *part* of the total loss which is in excess of any insurance compensation. Section 165(a) is not concerned with whether or not there is any insurance recovery but is intended simply as a measure of the amount of the loss (the uncompensated part) which is deductible.

4. The Tenth Circuit then purported (p. 124) to find support for the above *non sequitur* with the statement that Section 1231 is "contextually similar" to the sections dealing with capital gains and losses. The court did not explain what it meant by the phrase "contextually similar" and the statement, by itself,

seems without significance to the issue before it. However, in the next sentence it reveals the misdirection of its approach, saying "Thus, a compensated loss is a taxable event closely akin to a 'sale or exchange.'" However true that may be, it fails to meet the issue, for the Government did not, and does not, claim that the instant loss is covered under Section 1231 as a "sale or exchange" but as an "involuntary conversion." We are not concerned, therefore, with the relationship between *compensated* losses and sales or exchanges, but with that between a wholly *uncompensated* loss and an involuntary conversion, as that term is used in Section 1231. A positive relation between the first pair has no tendency, without more, to establish a negative relationship between the latter pair. The nearest the court came to addressing itself to the latter was in its next sentence, wherein it merely observes that where nothing is received in compensation, the "factual situation is entirely different [from a sale or exchange, presumably] and there is no rational basis for capital loss treatment." Here, again, the court's conclusion necessarily rested upon an erroneous assumption, i.e., that Section 1231 capital loss treatment may apply only where there is a sale or exchange. But a major and un-mistakable feature of Section 1231 is the clearly expressed intent to provide capital loss treatment, where the specified circumstances existed, to other

events (i.e., involuntary conversions) *in addition* to sales or exchanges,⁷ and, for this purpose, to consider involuntary conversions as different from sales or exchanges.

Section 1231(a) clearly treats the two as different in scope. After naming, as *one* of the types of gains included, those from "sales or exchanges of property used in the trade or business," it specifies "*plus*" those from "the compulsory or *involuntary conversion* [into other property or money] * * * of property used in the trade or business." (Emphasis added.) Both deal with business property; the only difference in the two is that one specifies sales or exchanges while the other adds involuntary conversion into other property or money. By using the word "plus," the Congress must have intended to add something not covered by "sales or exchanges." This the Tenth Circuit ignored in making its statement that Section 1231 was "contextually similar."

That sales or exchanges and involuntary conversions may be different transactions within the provisions of Section 1231 is recognized by tax authorities. In 3B Mertens, Law of Federal Income Taxation

⁷ In this connection, we point to the many other instances in the statute where capital gain or loss treatment was specifically provided, even though there was, in fact, no sale or exchange. See discussion in *Helvering v. Hammel*, 311 U. S. 504, 511.

(Rev.), Section 22.125, p. 516, dealing with Section 1231, the two are discussed as different classes of dispositions. With specific reference to the question at bar, it is said (p. 517) that:

The provisions here discussed refer to a conversion "into other property or money," although in some instances of involuntary conversion a loss may be suffered just because the conversion does not result in receipt of any quid pro quo. For purposes of the instant provisions, under the Regulations there is nonetheless a qualifying involuntary conversion in such a case.

It is further stated, on the same page, that, as to gains from involuntary conversions, capital gain treatment is provided *even though* there is no actual sale or exchange, which would otherwise (that is, without the special provisions of Section 1231) be required for capital gain treatment. In Section 22.122, pp. 509-510, it is said that:

Another requirement for capital gain or loss treatment [other than as provided in Section 1231] is that the capital asset be disposed of in a "sale or exchange." In many instances in which there is a compulsory disposition or an "involuntary conversion" of a capital asset, as in the case of the destruction of property, there is no sale or exchange, and again, in the absence of any further provision [i.e., Section 1231], capital gain or loss treatment would not be available.

See also p. 514, stating that "The limited capital gain tax is applied, moreover, not only where there is a sale

or exchange of such assets but also where they are the subject of an involuntary conversion.” And see 3 Rabkin & Johnson, *supra*, Section 43.07, p. 4359.

5. The Tenth Circuit announced (p. 124) that if the taxpayer can prove that the loss qualifies as a casualty, “it is only logical to conclude that Congress intended that there be an ordinary deduction under Section 165.” Why it is logical, the court did not say and, in fact, it is the very antithesis of logic. See our discussion in 1, *supra*, and the reference in all cited authorities to the inclusion of casualty losses under Section 1231. Furthermore, this comment by the court, we submit, was directly in contradiction to everything it had said up till that point, for it had been engaged in an effort to show that insured *casualty* losses were under Section 1231, but uninsured *casualty* losses were under Section 165. Since both categories are casualties, it is manifest that that cannot be the determinant.

6. In attempting to avoid the clear provision of the long-standing Treasury Regulations, *supra*, approved and given effect by the Fourth, Fifth and Sixth Circuits in reaching an opposite conclusion as to the coverage of the pre-1958 statute, the Tenth Circuit chose (p. 124) to treat the applicable regulatory provision that involuntary conversions shall apply whether or not other money or property is received as not cover-

ing casualty losses despite the clear statement of Section 1231(a)(2), *supra*, that losses from the destruction of property (this being the very nature of a casualty loss and, certainly, the situation involved both here and in the *Maurer* case) are to be considered losses from an involuntary conversion.

The judgment of the District Court should be reversed as to the Section 1231 issue.

CONCLUSION

The cases should be remanded with instructions to dismiss the complaint in its entirety.

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January, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of January, 1968.

United States Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 165. LOSSES.

(a) *General Rule.*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * *

(26 U.S.C. 1964 ed., Sec. 165.)

SEC. 631. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) *Election to Consider Cutting as Sale or Exchange.*—If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than 6 months before the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. If such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the fair market value of such timber, and the adjusted basis for depletion of such timber in the hands of the taxpayer. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this subsection, such elec-

tion shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding on the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Secretary or his delegate, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this subsection except with the consent of the Secretary or his delegate. For purposes of this subsection and subsection (b), the term "timber" includes evergreen trees which are more than 6 years old at the time severed from the roots and are sold for ornamental purposes.

* * *

(26 U.S.C. 1964 ed., Sec. 631.)

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

(a) *General Rule.*—If during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as

gains and losses from sales or exchanges of capital assets. For purposes of this subsection.

(1) in determining under this subsection whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing taxable income, except that section 1211 shall not apply; and

(2) losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

* * *

(26 U.S.C. 1964 ed., Sec. 1231.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.1231-1 *Gains and losses from the sale or exchange of certain property used in the trade or business.*

* * *

(d) *Extent to which gains and losses are taken into account.* All gains and losses to which section 1231 applies must be taken into account in determining whether and to what extent the gains exceed the losses. For the purpose of this computation, the provisions of section 1211 limiting the deduction of capital losses do not apply, and no losses are excluded by that section. With that exception, gains are included in the computations under section 1231 only to the extent that they are taken into account in computing gross income,

and losses are included only to the extent that they are taken into account in computing taxable income. The following are examples of gains and losses not included in the computations under section 1231:

(1) Losses of a personal nature which are not deductible by reason of section 165 (c) or (d), such as losses from the sale of property held for personal use;

* * *

(e) *Involuntary conversion*.—(1) *General rule*. For purposes of section 1231, the terms “compulsory or involuntary conversion” and “involuntary conversion” of property mean the conversion of property into money or other property as a result of complete or partial destruction, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof. Losses upon the complete or partial destruction, theft, seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion whether or not there is a conversion of the property into other property or money unless subparagraph (2) of this paragraph applies. For example, if a capital asset held for more than 6 months, with an adjusted basis of \$400, but not held for the production of income, stolen, and the loss is not compensated for by insurance or otherwise, section 1231 applies to the \$400 loss.

(2) *Certain uninsured losses*. Notwithstanding the provisions of subparagraph (1) of this paragraph, losses sustained during a taxable year beginning after December 31, 1957, with respect to both property used in the trade or business and any capital asset held for more than 6 months and held for the production of income, which losses

arise from fire, storm, shipwreck, or other casualty, or from theft, and which are not compensated for by insurance in any amount, are not losses to which section 1231(a) applies. Such losses shall not be taken into account in applying the provisions of this section.

* * *

(g) *Examples.* The provisions of this section may be illustrated by the following examples:

* * *

Example (3). A's yacht used for pleasure and acquired for that use in 1945 at a cost of \$25,000, was requisitioned by the Government in 1957 for \$15,000. A sustained no loss deductible under section 165(c) and since no loss with respect to the requisition is recognizable, the loss will not be included in the computations under section 1231.

(26 C.F.R., Sec. 1.1231-1.)

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AS APPELLANT
and
ANSWER OF WEYERHAEUSER COMPANY
AS CROSS-APPELLEE**

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In the
**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WEYERHAEUSER COMPANY, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

**REPLY OF WEYERHAEUSER COMPANY
AS APPELLANT**

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I. TAXPAYER AND GOVERNMENT ARE IN AGREEMENT ON MAJOR POINTS

The Government's answering brief contains a single thesis. It asserts that the "contractual relations here provided for the pooling of logs" instead of the "contract right to cut timber" required by § 631(a) (Govt. Br. 3-4). The purpose of this reply is to demonstrate the error in that thesis, after first briefly noting the major points on which taxpayer and Government agree.

A. Taxpayer and Government Agree That No Other Party Can Claim the § 631(a) Benefits In Issue

The Government has volunteered that Mountain Tree Farm Company cannot claim the § 631(a) benefits in issue (Br. 9):

"Of course, Mountain Tree, the logger, was not given a 'contract right to cut' qualifying it for § 631 benefits since it had no unlimited right to dispose of the cut timber. *Cf. Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th); *United States v. Johnson*, 257 F. 2d 530 (C.A. 9th)."

The Government has thus implicitly also acknowledged that Scott cannot claim a contract right to cut *taxpayer's half* of the Watershed timber because Scott also "had no unlimited right to dispose of the cut timber." Scott divested itself of that right in the formation of the 1946 venture by granting taxpayer a right to a *full one-half* of the Watershed timber regardless of the source of the cut (Taxpayer's Opening Br. 28-29). Thus, the Government makes no pretense

of championing Scott's cause.¹ At the same time the Government has acquiesced in our statement that the loss of the benefits by both taxpayer and Scott would mean a windfall to the Government resulting from the taxpayer-Scott effort to accommodate the public interest in the Watershed (Taxpayer Br. 36-37). While the Government has declined to expressly admit that it seeks a windfall, its attack on taxpayer's position, without corresponding support of Scott's position, obviously amounts to the same thing.

B. Taxpayer and Government Agree That Taxpayer Is Exclusively Vested With the Proprietary Interest Essential to a § 631(a) Claim

The Commissioner and this Court have declared a proprietary interest in timber requisite to § 631(a) benefits and defined such an interest as "an unrestricted right to sell the logs for the taxpayer's own account or to use them in the taxpayer's trade or business" (Taxpayer's Br. 15-17). The parties are agreed that, as a result of the taxpayer-Scott venture, taxpayer acquired an unrestricted right to sell, or use in its business, half of the Watershed harvest (Pret. Ord. ¶ 2(h), Record 6-7). It was in response to Seattle's requirement of a single logging operation in the Watershed that taxpayer and Scott united their Watershed timber in a venture under which they shared

¹The Government has further conceded (by failing to challenge) taxpayer's contention that awarding Scott § 631(a) benefits arising from gains realized by taxpayer from taxpayer's half of the Watershed timber would grossly distort the taxable income of both taxpayer and Scott (Taxpayer's Br. 29-35). Finally, the Government has acquiesced in taxpayer's contention that Scott cannot be considered to have cut taxpayer's half of the Watershed timber (Taxpayer's Br. 29).

equally not only in the timber harvest, but in contributions, risks, control and gains as well. (Taxpayer's Br. 15-22). Since the contributions were made at 1946 stumpage prices of \$1 - \$7 per thousand, the gains derived by the venture accrued from appreciation of the timber over the 1946 prices. Such gains of the venture produced § 631(a) capital gain benefits under the formula contained in that statute (Taxpayer's Br. 19). We contended that just as gains of the venture were shared equally, so should the § 631(a) benefits arising from the venture's gains be shared equally. To summarize, *the § 631(a) benefits claimed by taxpayer are solely those arising from timber appreciation realized by taxpayer from exercise of its undisputed right to use or sell half of the Watershed harvest.* In fact, the Government has conceded (Br. 11):

“ . . . that the agreements ultimately enabled it [taxpayer] to profit from appreciation in Scott's timber ”

Thus the Government concedes *taxpayer's right to the gains producing the § 631(a) benefits here in issue.*

It is apparent from the Government's concessions that this Court's task is not one of contract *construction*. Rather, it is one of contract *characterization*. In short, the parties do not seek the assistance of this Court to ascertain whether taxpayer has the right to the financial benefit of the post-1946 appreciation which produced the § 631 benefits in issue because the Government *concedes* that taxpayer has the right to the financial benefit of such appreciation. Rather, the Government's brief asks only that this Court characterize that right for tax purposes. Was it a right to

“cut timber,” as taxpayer contends, or was it merely a right to share in a “pooling of logs” as the Government contends? We believe we can provide a clear and convincing answer to that question. After we have done so, we will point out the errors we see in the Government’s answer to the question.

II. TAXPAYER’S PROPRIETARY RIGHT SHOULD BE CHARACTERIZED AS A RIGHT IN “TIMBER” NOT “LOGS”

We ask the Court to observe that taxpayer has undisputedly met every burden heretofore imposed upon § 631(a) litigants, i.e., taxpayer has proved its unrestricted right to sell the timber for its own account or use it in its business and to realize the timber appreciation which triggers the operation of § 631(a). Yet the Government says that taxpayer should not prevail because its interest was in “logs” rather than in “timber.” Although one ends up with wood fiber whether he has rights in “timber” or in “logs,” the Government’s assertion implies that there is a meaningful distinction between the two interests. The Government does not say what the distinction is. We must begin our analysis by identifying it.

It seems likely that the physical distinction between “timber” and “logs” is one upon which taxpayer and Government can readily agree. When asserting that taxpayer’s interest was in “logs,” the Government no doubt intends to say that such interest was in *felled* trees. By contrast, the Government presumably understands the term “timber” as used in § 631(a) to mean *standing* trees.

A businessman will immediately see that, arising out of the physical difference between "timber" and "logs," there is an economic difference of great importance. He will see that an interest in standing timber requires a cutting or logging operation with all its opportunities, risks and responsibilities. He will further see that, to avoid the risks and responsibilities of a logging operation by purchasing "logs," one must buy at the higher prices effective in the "log" market rather than at the lower "stumpage" prices effective for timber still on the stump. Obviously, the higher cost of logs reflects the expense involved in converting timber into logs by felling the timber, bucking the logs and moving them to the dump. The economic lesson for the businessman is clear. He may pay a "stumpage" price for timber on the stump and bear the risks and responsibilities of the logging operation, or pay a "log" price for logs in the dump or pond. But he cannot afford *both* to bear the risks and responsibilities of logging *and* pay a "log" price. If his contract requires him to bear the risks and responsibilities of logging, economic logic drives him inexorably to the conclusion that he must pay no more than a "stumpage" price for standing timber. The opposite side of the same economic coin is that the timber owner who receives no more than a "stumpage" price must insist that his purchaser bear the risks and responsibilities of the logging operation.

We will demonstrate that taxpayer's interest was in "timber" and not in "logs" because (i) taxpayer paid a "stumpage" price rather than the higher "log"

price, and (ii) the contracts placed upon taxpayer the opportunities, risks and responsibilities of the logging operation.

A. Taxpayer Paid a "Stumpage" Price for Standing Timber, Not the Higher "Log" Price

Assume a year in which the *entire* Watershed harvest is from Scott timber. Taxpayer would be obliged to pay Scott for taxpayer's entire half of the Watershed harvest under the provisions of ¶ II (b) of Exhibit 2.² That is, in a year when nothing is harvested from taxpayer's timber, taxpayer (as the "company from whose timber the lesser total value was produced") must pay to Scott (as the "company from whose timber the greater value was produced") half of the value produced. Note that the payments are termed "stumpage" and "stumpage prices":

"... 'Stumpage' has a well defined legal meaning. It means standing timber." *Giustiana v. United States*, 190 F. Supp. 303, 313 (D.C. Ore. 1960).

Contrast the above "stumpage" payment provision of ¶ II(b), under which taxpayer paid for its half of the Watershed timber, with the provision for a "log" purchase contained in ¶¶ II(c) and (d) of Exhibit 2.

²"(b) The stumpage to be paid by one company to the other from time to time shall be determined as follows: . . . the following prices shall be applied to the quantities of logs, hemlock pulpwood, . . . removed and delivered from the timber of each of the parties during the preceding year: (1) the zone stumpage prices for logs prescribed in Exhibit A hereto, (2) the price of fifty (50c) cents per cord of 128 cubic feet for hemlock pulpwood The difference in total prices, as so determined, shall be computed and one-half thereof shall be forthwith paid by the company from whose timber the lesser total value was produced during said year to the company from whose timber the greater value was produced. . . ."

The latter provision, while acknowledging that each party has a right to half the harvest from the Watershed each year regardless of the source of the harvest, recognizes the practical impossibility of precisely equal deliveries. For example, assume, again in a year where the entire harvest is from Scott timber, that Scott inadvertently receives 1,000 B.F. of timber in excess of its half share. Under the "stumpage" payment provision of ¶ II(b) discussed above, taxpayer would, nonetheless, be obliged to pay Scott for exactly half the Watershed harvest. In other words, taxpayer would pay Scott up to \$7 for the 1,000 BF inadvertently delivered to Scott as an excess over Scott's rightful half share. However, under ¶ II(c) Scott is required to pay taxpayer the current Puget Sound "log" price for the 1,000 BF erroneously delivered to Scott.³

³“(c) It has been agreed herein and in the logging contract that the Timber Companies shall each receive one-half of all logs of each species produced from the timber of both companies, but it is recognized that the deliveries of various grades of logs cannot and will not remain equal from time to time. It is therefore agreed that deliveries of each grade of each species of logs shall be kept as nearly equal as possible between the two companies at all times, but that within ten days following the end of the calendar year hereafter the parties hereto will determine the quantity of logs of each grade and species delivered to each of them during the preceding calendar year and the company which shall have received an excess in value of logs during said year on account of differences in grades shall pay to the other company an amount equal to one-half of such excess value. The quantities of logs so delivered shall be determined, in the absence of clear mistake, on the basis of the reports to be made in accordance with Article V of the logging contract, and the value of each grade of logs of each species shall, for the purposes of this paragraph (c), be deemed to be the market price, at the time of delivery hereunder, for like logs delivered in Puget Sound waters and scaled, rafted, and ready for towing; provided, however, . . . if it shall reasonably appear that there is no longer a reliable market valuation on Puget Sound for logs of such grade or grades, then the valuation therefor on the Columbia River shall thereafter apply; and provided further, . . . if it reasonably appears that there is no longer a

In other words, the substance of ¶¶ II(b), (c) and (d), taken together, is that taxpayer purchases “stumpage” from Scott at up to \$7 per M and [after bearing the costs and responsibilities of the logging operation (Taxpayer’s Br. 25-26)] sells to Scott the resulting “logs” inadvertently delivered to Scott, at the Puget Sound “log” price. Assuming a Puget Sound log price of \$80 per M, and a logging expense of \$30 per M, the result would be:

Puget Sound Log Price Paid by	
Scott to Taxpayer	\$80.00
Stumpage Paid by Taxpayer to Scott	\$ 7.00
Logging Expense Borne by Taxpayer	30.00
Total Cost to Taxpayer.....	37.00
GAIN TO TAXPAYER BY SELLING LOGS	
FROM SCOTT TIMBER TO SCOTT.....	\$43.00

The importance of ¶¶ II(c) and (d) is that they represent a painstaking description by taxpayer and Scott of a “log” sale. They prove conclusively that when the parties wanted to describe a “log” sale they knew exactly how to do so. Note the exacting effort of the parties to establish log prices which would truly reflect log market values, complete with references to the Puget Sound “log” market and the alternative

reliable market valuation for such grade or grades of logs on either Puget Sound or the Columbia River, then the parties shall exert their best efforts to agree upon a valuation for such grade or grades, giving consideration, among other things, to the relative values of such grade or grades of logs and logs of other grades and species with respect to which there is an open market

“(d) If the parties should be unable to agree upon whether an open market for any grade or grades of logs exists on Puget Sound or the Columbia River, or upon a valuation for any grade or grades of logs, then the matter in controversy shall be settled by arbitration”

Columbia River “log” market. Note further the provisions for attempts at agreement on log market values in the absence of reliable Puget Sound or Columbia River markets, and failing agreement, the provision for arbitration.

Contrast all this with the brief, simple provisions of ¶ II(b) which stipulate *fixed* “stumpage” prices. *It was under ¶ II(b) that Taxpayer acquired its half of the harvest from Scott lands.* We submit that if the parties had intended taxpayer’s acquisition from Scott to be a purchase of “logs,” they would have framed the acquisition in the far more detailed and complex language of ¶¶ II(c) and (d). Since the parties obviously knew how to describe a log purchase, when they intended one, their express designation of Weyerhaeuser’s purchase from Scott as a “stumpage” purchase must be considered intentional.⁴

B. Taxpayer Had the Opportunities, Risks and Responsibilities of the Logging Operation

Because taxpayer paid only a “stumpage” price, it is to be expected that the contracts would place upon taxpayer the risks and responsibilities (and the opportunities) of the logging operation respecting taxpayer’s half of the Watershed harvest. We so demonstrated in our opening brief (Taxpayer’s Br. 22-27). While the timber was necessarily felled by real woods-

⁴There is a noteworthy parallel between the instant case and a leading § 631(a) case decided by this Court, *United States v. Johnson*, 257 F. 2d 530 (9th Cir. 1958). In that case a partnership acquired a contract right to cut timber from a timber company. As this Court described the contract provisions: (p. 532)

“Under this contract, the partnership was granted the right and license to enter upon the described lands and remove all merchant-

men, such woodsmen (as the trial court implicitly recognized) cannot be considered to have "cut" the timber within the meaning of § 631(a) because they were mere wage earners who received no benefit from the cutting (aside from wages), assumed no risk, and exercised no control. Likewise, Mountain Tree Farm Company was a mere wage earner receiving no benefit from the cutting except its wages, assuming no risk under its cost-plus-fixed-compensation arrangement, and having no right of control over the harvesting of the Watershed timber. *The opportunities, risks and responsibilities of the logging operation rested, one-half upon taxpayer and one-half upon Scott* (Taxpayer's Br. 23-27). Accordingly, under the Commissioner's rules [reflected in this Court's decision in *Achong v. Commissioner*, 246 F. 2d 445 (9th Cir. 1957), and the excerpts from the Commissioner's brief in *H-H Ranch, Inc., v. Commissioner*, 357 F. 2d 885 (7th Cir. 1966), contained in Appendix B of our opening brief] the cutting of taxpayer's half of the Watershed timber must be imputed, for tax purposes, to taxpayer. Any serious attempt to deny that the cutting of taxpayer's half of the Watershed timber

able timber, under the terms and conditions specified in the agreement.

"The partnership agreed to pay the timber company stumpage payments for all timber in the contract

". . . The timber company agreed to purchase from the partnership, 'at current market prices,' 'all logs logged' by the partnership from the described lands. . . ."

Thus, except that the sale back to the timber owner in *Johnson* was intentional rather than inadvertent, it is a parallel example of a holder of a contract right to cut acquiring standing "timber" at "stumpage" rates contained in a schedule and selling the resulting "logs" back to the timber owner at "current market prices."

should be imputed to taxpayer would require an attack on the very rules of law which the Commissioner has labored to establish in *Achong* and *H-H Ranch*, *supra*.

The Government has compromised. While defending on the issue, it has not challenged our analysis based on *Achong* and *H-H Ranch*. It has carefully refrained from attacking our demonstration that the contracts placed on taxpayer the opportunities, risks and responsibilities of the cutting. The Government thus destroys the plausibility of its thesis that taxpayer has an interest in "logs." If, as the Government admits, taxpayer has the opportunities, risks and responsibilities of logging, it cannot, as the Government asserts, have an interest in logs. Logging is an operation which must be performed upon *timber*. Thus, *Achong* and *H-H Ranch* tell us what common sense tells the businessman—the person who has the opportunities, risks and responsibilities of the logging operation has an interest in standing "timber," not felled "logs." ⁵

⁵While not attacking our analysis, the Government did make a brief collateral attack on our conclusion in an argument consisting of four sentences at p. 9 of its brief. It asserted that the control of Mountain by Taxpayer and Scott does not establish that Mountain was acting for them when cutting timber because ¶ VI of the logging contract (Exhibit 3) expressly negates that Mountain was the "agent" for either party. The same argument was the sole rationale of the Trial Court (aside from noticing that the taxpayer has the burden of proving the Commissioner in error by a preponderance of the evidence) in its initial Memorandum Order (R. 14). We then pointed out to the Court that "agent" is a label for a chameleon concept covering an infinite number of legal relationships. A corporation (being just a legal entity) can do nothing by itself. It cannot act except through the agency of real people, so it will have as many different "agency" relationships as it has different tasks to perform. For example, the "agency" relationship

III. THE GOVERNMENT'S ARGUMENTS CONTAIN READILY DISCERNIBLE ERROR

Since the Government has been unwilling to make a direct attack on the analysis contained in our opening brief it has been obliged to resort to a plethora of briefly stated arguments. We will point out as succinctly as we can the error we see in these arguments.

After stating its thesis that taxpayer acquired only a share in a "pooling of logs" the Government proceeds to its lead-off argument which seems to be, in substance, that had taxpayer *intended* to obtain § 631 benefits it could have easily drafted for this result

of a corporation with a truck driver that it employs is likely to result in the imputation to the corporation of the torts committed by the driver with his truck in the course of his employment; but it is unlikely that the driver can commit the corporation to a million dollar contract with a third party. Conversely, the "agency" relationship that the corporation has with an independent broker makes it unlikely that torts committed by the broker with his automobile while on corporate business will be imputed to the corporation; but the broker may nevertheless be an "agent" in the sense that his commitments respecting a million dollar contract may be imputed to the corporation. Other persons may have the authority to solicit orders for the corporation, but not to accept them, or to make representations of fact which are binding on the corporation, but not to make promises, or to make certain promises but not to make other promises. In short, a corporation may tailor its "agency" relationships to its need. It may create one relationship while expressly denying the existence of others. Taxpayer and Scott employed a standard agency denial in the hope that Mountain's torts would not be imputed to them. Such denials may be ineffective even for their intended purposes. *Restatement, Agency* (2d), § 220(2)(i), Comment *m*; *Mueller v. Cities Service Oil Co.*, 339 F. 2d 303 (7th Cir. 1964). See also *Matcovich v. Anglim*, 134 F. 2d 834 (9th Cir. 1943); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins*, 189 F. 2d 865 (2d Cir. 1951). In any case, a hope that torts will not be imputed does not answer the question as to whether logging should be imputed to a taxpayer for income tax purposes. Ultimately, the Trial Court agreed and in his Order Denying Motion for Reconsideration expressly withdrew reliance upon the agency denial contained in Exhibit 3 (R. 18). Indicative of the Government's lack of plausible alternatives is its resurrection of an argument which the Trial Court considered unfit even as a make-weight argument.

(Govt. Br. 4-5). Observing that the contracts do not give the taxpayer a right "itself" to enter on Scott's land and cut timber, the Government infers an *intent not to obtain* § 631(a) *benefits* from taxpayer's failure to draft for such a right. This inference utterly ignores the fact that such a right in taxpayer and Scott would have defeated Seattle's objective to have a *single* logger in its Watershed. It is surely illogical to impute an intent to forfeit § 631(a) benefits from an action necessary to accommodate the public interest.

The Government purports to see further evidence of an intent to forfeit § 631(a) benefits based on its conclusion that in the State of Washington the proper way to acquire a right to cut is by "formal deed." (Govt. Br. 5-6). It argues that if taxpayer and Scott "had intended to convey interests in timber it seems they would have used documents proper for that purpose." The fallaciousness of the Government's inference of intent is revealed by the fact that *not a single case we have found arising out of the State of Washington in which this Court, the Tax Court, and the District Court for the Western District of Washington have sustained* § 631(a) *benefits, has involved a formal deed!* On the contrary, all have involved contracts not meeting the formalities appropriate to deeds. *United States v. Johnson*, 257 F. 2d 530 (9th Cir. 1958); *Pinkerton v. Commissioner*, 28 T.C. 910, acquiescence 1958-1 Cum. Bull. 5; *Wirkkala v. United States*, 181 F. Supp. 338 (W.D. Wash. 1960). See also *Hitchcock v. Frank*, decided May 3, 1963, 63-1 USTC

¶ 9497 (W.D. Wash.)⁶ The Government's error lies in its failure to distinguish between one who claims under § 631 as an "owner" and one who merely claims, as does taxpayer, a "contract right to cut." Note that the Commissioner himself has contemplated that the requisite "contract right to cut" can be created (Rev. Rul. 58-295, 1958-1 Cum. Bull. 249 at 250):

" . . . Where a taxpayer is granted a *contractual right* to cut and remove all or a described part of the merchantable timber on a particular tract of land" (Emphasis supplied)

Moreover, it has been settled law in Washington State since 1893 that, notwithstanding Washington's deed statutes, an executory contract for the sale of standing timber is valid when in writing although not in the form of a deed. *Kleeb v. Bard*, 7 Wash. 41, 34 Pac. 138 (1893).⁷ The rule is the same with respect to con-

⁶The unanimity of the cases arising out of the State of Washington suggests the scope of the disaster to taxpayers if the Government were to succeed, this late in the day, in drawing negative inferences from the absence of formal deeds in cases involving contract rights to cut. Decisions arising out of other states also seem to be unanimous in approving contracts. *Gilmore v. United States*, 180 F. Supp. 354 (Ct. Cl. 1960); *Carpenter v. Commissioner*, 36 T.C. 797 (1961), *acquiescence* 1962-1 Cum. Bull. 3; *Lansing v. Commissioner*, TC Mem. 1964-82 Filed Mar. 30, 1964, 23 CCH Tax Ct. Mem. 498; *Shaffer v. Commissioner*, TC Mem. 1960-186, filed Sept. 12, 1960, 19 CCH Tax Ct. Mem. 978.

⁷The court reasoned (at p. 44): ". . . As to the Perry tract, conceding that an executory contract to sell standing timber to be cut and removed by the purchaser is a contract for the sale of an interest in land, and therefore within the statute of frauds (1 Warv., Vend., p. 175; *Owens v. Lewis*, 46 Ind. 488), still we are unable to see why the contract which respondent held from the Perrys did not meet this requirement. True, it was not a deed, but it is not necessary that a contract to sell land, as such, be a deed. The terms of this instrument showed that it was intended to be merely a license to occupy the land for such time and in such manner as should be required to remove the mer-

tracts for the sale of land itself. The application of the deed statutes has long been confined to conveyances of legal title and encumbrances. *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247 (1902); *Phillipp v. Curtis*, 35 Wn. 2d 844, 215 P. 2d 431 (1950).⁸ The cases included in the Government's brief, as well as other Washington cases referring to the deed statutes, either approve timber conveyances which were in fact made by deed⁹ or concern the question as to whether timber conveyed separately from the land be-

chantable timber therefrom, with the right to take the timber at fifty cents per thousand feet, to build and operate a sawmill, to use the water privileges on the land in connection with the mill, and to remove the mill after the timber had been manufactured. Neither the land, nor any interest in the land as land, was contemplated; but the timber was the principal subject matter of the contract, to which all the other uses to which the land might be put were incidents. Nothing in this contract created any exclusive right in the grantee to occupy the tract. On the contrary, both parties to it might have been exercising dominion over the whole of it at the same time, the Perrys in every way not inconsistent with the prosecution of the lumbering business by the respondent, and the latter in every way necessary to his business. These considerations, it seems to us, take such cases out of the purview of Gen. Stat., § 1422, which prescribes that conveyances of lands or interests therein shall be by deed. . . ."

⁸Consequently, the difference between the interests of a land contract vendee and a deed grantee is reduced to a quibble. The contract vendee has merely to ask a court to compel the deliverance of a deed. Furthermore, when the deed is delivered, it will be binding between the parties although it inadvertently omits the formality of an acknowledgment. *Ockfen v. Ockfen*, 35 Wn. 2d 439, 213 P. 2d 614 (1950). The timber contract holder has no need even to compel the delivery of a deed since he can obtain title to the timber simply by exercising his license to sever and remove it. *Kleeb v. Bard*, *supra*.

⁹*Coleman v. Layman* (cited by the Government), 41 Wn. 2d 753, 252 P. 2d 244 (1953), involved a timber deed and the court merely noted in passing that growing timber can properly be conveyed separately from the land by deed.

comes personalty or remains realty¹⁰ or involve questions about oral contracts.¹¹

The Government next professes to glean an intent of the parties to deal in "logs" from the way in which they used the terms "logs" and "timber" in the contracts (Govt. Br. 6-8). In fact, the parties used the term "timber" when referring to trees still standing and the term "logs" when referring to trees which had been felled. Such usage is common everywhere. The error of the Government's inference from such usage can be readily demonstrated. First, consider the language that the Commissioner himself has used in defining a "contract right to cut" (Rev. Rul. 58-295, *supra*):

"... Where a taxpayer is granted a contractual right to cut and remove all or a described part of the merchantable *timber* on a particular tract of land he has a proprietary interest in the *timber* cut by him if at the time of the cutting he has an unrestricted right to sell the *logs* or use them in his trade or business." (Emphasis added)

Thus, in the course of a *legal definition* of a "contract right to cut" the Commissioner considers it perfectly

¹⁰This was the issue in *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 192 Wash. 1, 22, 72 P. 2d 311 (1937), which was included in the quoted material from the Government's brief. The issue is a confused one in Washington because the Washington court has seemingly twice reversed itself on the issue, the second time without acknowledging that it was doing so. See Johnson, *Washington Timber Deeds and Contracts*, 32 Wash. L. Rev. 30 (1957), and *Leuthold v. Davis*, 56 Wn. 2d 710, 355 P. 2d 6 (1960).

¹¹In *Groeneveld v. Dean*, 40 Wn. 2d 109, 241 P. 2d. 443 (1952), also cited by the Government, the court simply sustained the lower court finding that no oral contract was proved so that it was unnecessary to consider whether there had been a part performance sufficient to remove it from the statute.

proper to apply the word "timber" only to trees still standing and to change to the word "logs" when referring to trees which have been felled. A further refutation of the Government's inference is contained in the contract itself, namely ¶ II(b) of Exhibit 2, which fixes the price that taxpayer must pay Scott for taxpayer's half of the Watershed timber derived from Scott's land.¹² The payments taxpayer is to make are termed "stumpage" and "stumpage prices." "Stumpage," as we have seen, has a well defined legal meaning as "standing timber." *Giustina v. United States*, *supra*. Note further that although the payment provision refers to "stumpage," i.e., payment for *standing timber*, the parties consistently described the trees purchased as "timber" when standing, and as "logs" when felled. Thus, the usage of the parties was consistent with that employed by the Commissioner in his definition of a "contract right to cut" within § 631(a).

Finally, the Government has noted "substantial incidents of ownership which each party retained in its

¹²"The *stumpage* to be paid by one company to the other from time to time shall be determined as follows: Within ten (10) days after the close of each calendar year the following prices shall be applied to the quantities of *logs*, hemlock *pulpwood*, and forest products other than said *logs* and *pulpwood*, removed and delivered from the *timber* of each of the parties hereto during the preceding calendar year: (1) the zone *stumpage* prices for *logs* prescribed in Exhibit A hereto, (2) the price of fifty (50c) cents per cord of 128 cubic feet for hemlock *pulpwood*, and (3) the agreed price or prices, under paragraph II(a) above, for forest products other than *logs* and hemlock *pulpwood*. . . ." (Emphasis supplied)

The Court will observe that in *all* cases where § 631(a) benefits have been approved for holders of contracts to cut "timber," the volume of timber has been ascertained by measuring *after* felling, which is the only practical way to do it. Hence, the references in the contracts to quantities and prices of "logs."

own timber” including “title,” “risk of damage and of destruction” and the obligation to pay “property taxes and charges for fire protection” (Govt. Br. 8-9). What the Government has overlooked is that taxpayer need not claim as an “owner” under § 631(a), but merely as the holder of a contract right to cut. Both this Court and the Tax Court have termed similar contract provisions as “boilerplate” not necessarily inconsistent with the possession of a contract right to cut within § 631(a). *United States v. Johnson*, 257 F. 2d 530, 534 (9th Cir. 1958); *Shaffer v. Commissioner*, T.C. Mem. 1960-186, filed Sept. 12, 1960, 19 T.C.M. 978, 985. Moreover, the Government’s argument is predicated on an erroneous or incomplete understanding of the risk of loss and property tax provisions.¹³

¹³It is not true that “each party retained the risk of damage and of destruction of its own timber by fire or other causes.” Such losses of the Watershed venture are shared equally between taxpayer and Scott. The provision of ¶ IV of Exhibit 2 that each party will assume the risk of casualty losses to its own timber is not an exception to equal sharing of losses, because it can affect only appreciation in the timber accruing prior to the formation of the venture in 1946. Loss of the appreciation accruing in the timber during the life of the venture is necessarily shared equally by the parties by reason of their equal sharing of the harvest. In other words, if all Scott timber should be destroyed, Scott loses the \$1-\$7 per thousand at which the timber is to be contributed to the venture, but taxpayer and Scott are equal losers of the gains they would have shared from the timber’s appreciation over the 1946 stumpage prices. And it is the post-1946 appreciation which produced the § 631(a) benefits here in issue.

Likewise, the Government has not understood the provision respecting payment of property taxes and charges for fire protection. It is true that each party pays such taxes and charges on its own timber for the period ending 1970 during which both parties were expected to have timber still standing. It is apparent that the parties believed that, while both had timber still standing, such a procedure would be easier and productive of roughly the same result as if they had made reciprocal contributions to each other for taxes and fire charges. After 1970, however when it was contemplated that all taxpayer’s timber might have been cut, the contract requires taxpayer to pay a full one-half of the taxes and charges respecting Scott’s timber.

The balance of the Government's brief simply anticipates, and attempts to rebut, the arguments which have been made in the earlier sections of this brief.

IV. CONCLUSION

Taxpayer and Scott, as owners of all the Watershed timber, started as the potential beneficiaries of all the § 631(a) benefits inhering in such timber. Refining of the issues by long litigation has eliminated Scott as a serious contender and the only question now is whether the accommodation of a public interest somehow caused the § 631(a) benefits to simply disappear with a resulting windfall to the Government.

We ask the Court to observe the absence of distinctions, meaningful in light of the language and policy of § 631(a), between taxpayer's claim and that of the typical § 631(a) claimant. We believe the Government will readily agree that the hiring of a logger, even one also employed by other parties, does not, of itself, preclude § 631(a) benefits. Nor should benefits be lost if an owner acts to safeguard the land and its reforestation by specifically identifying a reputable operator in the contract as did the grantee of the land, Seattle, in the instant case.

The fact that taxpayer's interest in the Watershed timber is an undivided half interest is surely no bar to § 631(a) benefits. It has no consequence except a delay in ascertaining the specific trees that taxpayer ultimately receives. Other taxpayers who make cutting contracts as joint venturers, joint tenants, or tenants-in-common, will be in the same position. So will taxpayers who are required by their contracts to cut "selectively," i.e., are not permitted to "clear cut" and

are thus unable to ascertain in advance of cutting precisely which trees they will receive. Similarly situated are lessees who agree to limit their annual cut to an amount equal to normal growth so that they are unlikely to know precisely which trees will be cut in any year or even which trees will be left at the termination of the lease. See, for example, *Dyal v. Union Bag-Camp Paper Corporation*, 263 F. 2d 387 (5th Cir. 1959).

In short, all distinctions between taxpayer's claim for § 631(a) benefits and more typical claims are revealed as quibbles which cannot stand against (i) taxpayer's unrestricted right to use or dispose of its half of the Watershed timber, (ii) the fact that taxpayer paid a "stumpage" rather than a "log" price, (iii) the fact that the actions of the woodsmen who felled taxpayer's half of the Watershed timber must be imputed to taxpayer under the Commissioner's own rules, (iv) the fact that taxpayer actually earned and paid taxes on the gains giving rise to the benefits taxpayer claims.

Respectfully submitted,

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No. 21834-A

In the
**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, *Cross-Appellant.*

vs.

WEYERHAEUSER COMPANY, *Cross Appellee,*

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

**ANSWER OF WEYERHAEUSER COMPANY
AS CROSS-APPELLEE**

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QUESTION PRESENTED

Whether property losses (not insured and, therefore, deductible under § 165 of the Internal Revenue Code of 1954) may be deducted from ordinary income, or are converted to mere capital losses by application of § 1231(a) of the Code.

STATUTE TO BE CONSTRUED

"Sec. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

"(a) General Rule. — If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For purposes of this subsection—

(1) in determining under this subsection whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into ac-

count in computing taxable income, except that section 1211 shall not apply; and

(2) losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion."

STATEMENT

During the years in issue, 1954, 1955, 1956 and 1957, cross-appellee (hereinafter "taxpayer") suffered losses, caused by various destructive agencies, of property used in its business (R. 4, 21). Because the losses were not insured, taxpayer claimed a deduction from ordinary income under § 165 of the Internal Revenue Code of 1954. On audit, the deductions were not challenged by the Government, but were converted to capital losses (R. 5, 21-22). The Government seeks to justify its action by application of § 1231(a) of the Code. The question thus presented is whether § 1231(a) applies to convert uninsured property losses, allowable as deductions under § 165, from ordinary to capital losses.

ARGUMENT

I

BACKGROUND OF QUESTIONS PRESENTED

The lower court resolved the question presented in favor of taxpayer, i.e., it held that § 1231(a) did not apply to convert taxpayer's uninsured 1954-57 losses of business property from ordinary losses to capital losses (R. 22). In so holding, it followed the *only* cases

squarely in point. *Maurer v. United States*, 284 F.2d 122 (10th Cir. 1960); *Oppenheimer v. United States*, 220 F. Supp. 194 (W.D. Mo. 1963).

After *Maurer* was decided by the Tenth Circuit, the Internal Revenue Service announced that it would not follow it as a precedent. Rev. Rul. 61-54, 1961-1 Cum. Bull. 398. When the issue was again decided for a taxpayer in *Oppenheimer* with express reliance on *Maurer*, the Government declined to appeal, but still would not acquiesce in *Maurer*. The instant case was the third to be decided in favor of a taxpayer and against the Government.

Things might have continued indefinitely in this vein but for the passage of the Technical Amendments Act of 1958, which, in a limited way, came to the Government's rescue. Ironically, the portion of that Act pertinent here, § 49, was intended to benefit taxpayers. It added a sentence to § 1231(a), preventing the application of that section to convert ordinary losses into capital losses *if* (i) the property affected is used in the trade or business or held for production of income, and (ii) the loss occurs during taxable years beginning after December 31, 1957. Subsequent to the amendment, the Government commenced to argue that the failure of the amendment to give relief from § 1231(a) for post-1957 losses to personal property meant that Congress intended such losses to be covered by § 1231(a). While the contention is plausible, and ordinarily would be highly persuasive, it can be argued that under the particular circumstances it includes a non sequitur. When Con-

gress passed the Technical Amendments Act of 1958, it could know only that the Commissioner was then denying relief which the amendment would provide. Congress did not know that the Tenth Circuit would later decide the issue not only in favor of taxpayers suffering losses to income property but in favor of taxpayers suffering losses to other property as well. One may fairly doubt whether, by passing an amendment for relief of taxpayers (suffering losses to income property), Congress intended to hand the Government a weapon for use against other taxpayers (suffering losses to personal property). Nevertheless, the Government's argument that an amendment aiding income property justified a negative inference against personal property met with quick success before the Tax Court. *Cheuning v. Commissioner*, 44 T.C. 678 (1965). Later three circuits followed the Tax Court's lead. *Cheuning v. Commissioner*, 363 F. 2d 441 (4th Cir. 1966), cert. denied, 385 U.S. 930 (1966); *Morrison v. United States*, 355 F. 2d 218 (6th Cir. 1966), cert. denied, 384 U.S. 986 (1966); *Campbell v. Waggoner*, 370 F. 2d 157 (5th Cir. 1966).

Note, however, that despite the Government's reliance on them *these cases are not in point* for two reasons. First, taxpayer is the first taxpayer litigating this issue to have suffered losses to *income* property. Thus, the negative inference that the Government seeks to draw from the 1958 amendment (i.e., that because it benefits taxpayers with losses to income property, it hurts taxpayers with losses to personal property) is not applicable to taxpayer. Second, this

case, like *Maurer* and *Oppenheimer*, involves years before the effective date of the 1958 amendment. The Tax Court, in *Chewning*, *supra*, considered the latter distinction alone sufficient to distinguish *Maurer* and *Oppenheimer* and expressly declined to pass on the issue there involved.

Nevertheless, the Government has been sufficiently encouraged by the post-1957 cases to appeal this case and try another attack on *Maurer*. In response, we defend the *Maurer* decision, the unappealed *Oppenheimer* decision, and the lower court's decision in the instant case, on four grounds:

(i) The *Maurer* rationale is sound as the only one consistent with the literal mandate of the statute.

(ii) The legislative history supports *Maurer* as applied to the facts of the instant case.

(iii) The post-1957 cases do not undermine *Maurer* as applied to the instant case.

(iv) The Government has argued before the Supreme Court that *Maurer* should be distinguished from the post-1957 cases.

II

THE MAURER RATIONALE IS SOUND

A. The *Maurer* Rationale Is in Accord With the Literal Terms of the Statute.

It is undisputed that taxpayer's uninsured property losses are deductible under § 165 of the Internal Revenue Code of 1954. The dispute that exists is whether taxpayer may deduct such losses from ordinary income or merely from capital gain income. We

believe that in resolving this dispute the Court may consider taxpayer and the Government as agreed upon the following:

1. Under the general Code definitions, a loss will be a capital loss only if there is a *sale or an exchange* of a certain type of asset. § 165(f); § 1222 (2) and (4).

2. The property which taxpayer lost through destruction was not sold or exchanged — it was merely lost.

3. Accordingly, under the general Code definitions taxpayer's losses would be deductible from ordinary income.

4. In defense of its position that taxpayer's losses are deductible only from capital gain income, the Government must contend that the first sentence of § 1231(a) applies to require that taxpayer's losses be "considered" as losses from sales or exchanges.

The sole Circuit Court decision applicable to pre-1958 years is *Maurer v. United States, supra*, decided by the Tenth Circuit.

Maurer involved damage to trees and plants and other physical damage to property caused by drought and abnormal weather conditions. Under the jury verdict in the trial court, the losses were deductible under § 165. They were deductible from ordinary income unless § 1231(a) applied. Relying upon both the literal language of that section and its legislative history, the Tenth Circuit concluded that § 1231(a)

did not apply to convert the losses from ordinary losses to mere capital losses.

Section 1231(a) applies to an:

“ . . . involuntary conversion . . . of property . . . into other property or money. . . . ” (Emphasis supplied)

As the Tenth Circuit pointed out, it literally applies only to certain assets which have been involuntarily converted “into other property or money.” Destroyed property which is insured is, of course, converted into money. But property which is destroyed and not insured is not converted into anything. It is simply lost. Section 1231(a), by its literal terms, does not cover it. Thus, only by ignoring the express provisions of the statute is it possible for the Government to resist the conclusion of the Tenth Circuit.

Note that the Government’s reliance on the provision of § 1231(a)(2) that losses upon destruction shall be considered losses from “involuntary conversions” (Govt. Br. 17-18) wholly begs the question. Knowledge that destroyed property has been converted does not answer the question posed by § 1231(a), “converted into what?” The literal mandate of § 1231(a) relied upon in *Maurer* requires conversion into something specific, i.e., other property or money.

After *Maurer* the pre-1958 loss issue was again considered by a Missouri district court in *Oppenheimer v. United States, supra*. The uncompensated casualty loss involved there resulted from windstorm damage to a residence. The court noted that the Gov-

ernment had announced that it would neither follow *Maurer* nor appeal it and concluded that, unless clearly wrong, *Maurer* should be followed. The Government declined to appeal *Oppenheimer* to the Eighth Circuit.

B. *Maurer* Is Supported by the Legislative History.

The legislative history, relating both to the original enactment of § 1231(a) and its amendment in 1958, supports *Maurer* as applied to the facts of the instant case. In this connection, note that the Government has not claimed support from the legislative history underlying the original enactment of § 1231(a). The Government's legislative history argument (Govt. Br. 19-23) is limited to the 1958 amendment and its own regulations.

The Tenth Circuit pointed out in its review of the legislative history that Congress, when enacting § 1231(a), was focusing on property seized in furtherance of the World War II effort. Such seizures were, of course, compensated. It was quite natural, therefore, for Congress to have had in mind compensated conversions when enacting the statute. As the Tenth Circuit reasoned, compensated losses are analogous to a "sale or exchange" for which capital treatment is the general rule. Where, however, the taxpayer receives nothing in return for his property, there is no analogy. Hence, the distinction made by the Court between compensated losses and uninsured losses is supported by general principles as well as the literal language of the statute.

The legislative history of the 1958 amendment to

§ 1231(a) also supports the application of *Maurer* to the facts of the instant case. In its argument to the contrary (Govt. Br. 19-20), the Government has omitted from its brief, and from its reasoning, the most pertinent part of the legislative history relative to the 1958 amendment. Consideration of the omitted history will, we believe, reveal the error in the Government's analysis.

Upon learning in 1958 that the Treasury was including uninsured losses of income property within § 1231(a), thus denying ordinary loss treatment, Congress declared this an "*unintended hardship!*" S. Rep. No. 1983, 85th Cong. 2d Sess., pp. 74-75 (1958-3 Cum. Bull. 922, 995-996). It reversed the Treasury's policy by enacting § 49 of the 1958 Act which precludes application of § 1231(a) to uninsured losses of income property incurred in 1958 and subsequent years.

Specifically, Congress was concerned by the Treasury's discrimination against self-insured businessmen. A self-insured businessman pays his premiums, in effect, by absorbing losses. He gambles that the losses he must absorb will compare favorably with the cost of premiums. Congress could see no reason why a businessman paying his premiums in this fashion should not be treated the same as the businessman who pays premiums on a policy of insurance. Yet the policyholder can deduct his premiums from ordinary income, while the Treasury, by its application of § 1231(a), denied the same right to the self-insured businessman who happened to realize § 1231(a) gains in the same year he suffered the casualty loss. Con-

gress put an end to this “unintended hardship” by enacting the 1958 law, explaining:

“Where a taxpayer elects to be a self-insurer against casualty losses, there seldom is a conversion into money or other property, as there would be if the destroyed property were insured. If this casualty loss were the only loss incurred during the taxable year by the self-insured person, he would be entitled to the full benefit of an ordinary loss deduction under section 1231, but where there are also 1231 gains, the casualty loss is partially or wholly offset against these gains which would otherwise be taxed as capital gains. As a result, the benefit of having casualty losses treated as ordinary, rather than capital, losses may be reduced or eliminated in the case of self-insurers, depending on the fortuitous circumstance as to what gains the taxpayer may have from trade or business assets or involuntary conversions. This is not a problem for those who are fully insured by others because they receive insurance payments in the case of destroyed property which offset the casualty losses which would otherwise be realized. Moreover, such persons may deduct currently the cost of their insurance for property used in a trade or business. Thus, in their case they obtain a deduction against ordinary income for any premiums paid and any gains from trade or business assets (or involuntary conversions) are taxed as capital gains and are not offset against losses (since these are covered by insurance) which would otherwise be treated as ordinary losses.

“Your committee believes that this constitutes an *unintended hardship* and for that reason it has added a provision to the House bill amending section 1231(a) of the code. . . .” (Emphasis supplied) S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 74-75 (1958-3 Cum. Bull. 922, 995-996).

Subsequently, in *Maurer*, the Tenth Circuit construed the original § 1231(a) language, applying it to a year prior to the effective date of the 1958 Act. Its decision reveals that the hardship was indeed “unintended.” The Tenth Circuit found no warrant in the original § 1231(a) language for the Treasury’s imposition of the hardship. Its decision results in the treatment “intended” by Congress, namely that the self-insured businessman may deduct his costs against ordinary income just as the insurance policyholder may. That is the result which the taxpayer contends for here. Thus, taxpayer’s position is precisely in accord with *Maurer*, the 1958 Act, and the result Congress has indicated was “intended” under § 1231(a). The Government attempts to impose here the exact tax treatment which Congress labeled as an unintended hardship.

The legislative history quoted in the Government’s brief omits the declaration that the Treasury’s inclusion of losses to business property within § 1231(a) was an “unintended hardship.” While the Congress could not know, in 1958, that the Treasury’s imposition of the hardship would be reversed two years later by the Tenth Circuit in *Maurer*, it is apparent that Congress was quite clear as to the result it “intended” respecting business property in the original enactment of § 1231(a).¹

¹The Government may attack *Maurer* as guilty of over-kill, because it also allows a deduction against ordinary income for losses to personal property, whereas the 1958 Act does not. The Government may argue that the result is discriminatory against policyholders, since premiums for personal property are nondeductible. The distinction does exist, but it

The Government attempts to buttress its legislative history argument with reliance upon its own regulations which the Government lauds as having weathered the storms of statutory amendments and reenactments since 1943 (Govt. Br. 20-23). Note that the regulations, *as the Government interprets them*, are flatly contrary to the literal provisions of the statute. Whereas § 1231(a) literally requires an "... involuntary conversion ... of property ... into other property or money ...," the regulations add "*whether or not* there is a conversion of property into other property or money" (Emphasis supplied). Obviously, the Treasury's "whether or not" clause is its own invention. The Tenth Circuit, in *Maurer*, politely refrained from invalidating the clause by giving it the benefit of every doubt and construing it (contrary to the Government's construction of it here) as consistent with the statute.

was purposely created by Congress itself, not by *Maurer*. Section 165 (c) (3) allows individual taxpayers a deduction for casualty losses to personal property. There is no similar deduction for premiums paid for casualty insurance on such property nor for other personal losses. Congress has simply been more solicitous of improvident taxpayers who fail to insure against casualty losses than it has been of their more prudent fellow citizens. All *Maurer* could decide was a question of degree (i.e., whether the deduction benefit should be capital or ordinary). *The distinction persists even under the 1958 Technical Amendments Act and will continue as long as § 165 (c) (3) is part of the Code.* The only issue under the 1958 Act is the degree to which the distinction will persist. It will persist unmitigated in the case of uninsured taxpayers who have no § 1231(a) gains in the year of their casualty loss. Only with respect to taxpayers who have such gains does the 1958 Act, under the *Chewning*, *Morrison* and *Waggoner* decisions, *supra*, reduce the degree of difference in treatment. The point here is that, with respect to business property, *Maurer* avoided the "unintended hardship" the Treasury sought to impose, and nothing has occurred in the area of personal property to undermine *Maurer's* soundness in the business area.

In any event, it is apparent that the Treasury's interpretation survived until 1958 only because Congress was not aware of it. The absolute lack of any cases on the uninsured casualty loss issue prior to 1960, and the plethora of cases commencing in 1960, reveals that the Treasury did not raise the issue (and thus call it to the attention of Congress) until the late 1950's. Congress thereupon promptly reversed the Treasury's position with respect to income property. The Government's reliance upon its own regulations is thus unwarranted under the circumstances.

C. The Decisions in the Post-1957 Cases Do Not Undermine *Maurer* as Applied to the Instant Case.

The *Chewning*, *Morrison* and *Waggoner* cases, *supra*, construing the 1958 Technical Amendments Act, and relied upon by the Government (Govt. Br. 23-25) are not in point with the instant case. Their rationale is that, because the 1958 Act was intended to give relief for post-1957 losses to income property, an inference may be drawn against taxpayers who incurred *post*-1957 losses to personal property. Clearly, the same inference is not justified against taxpayers incurring *pre*-1958 losses to *income* property.

The Tax Court was extremely careful not to extend the inference outside the years covered by the 1958 Act. It said in *Chewning* (p. 685):

“. . . However, we express no opinion as to the correctness of the *Maurer* case, since, unlike the instant case, it involved a casualty loss suffered in a year prior to the effective date of the amend-

ment of Section 1231 by the Technical Amendments Act of 1958. . . .

"The petitioners also cite *Oppenheimer v. United States*, (W.D. Mo.) 222 [sic] F. Supp. 194, in support of their contention. We consider such case inapposite since it also involved a casualty loss suffered in a year prior to the effective date of the amendment made to Section 1231 by the Technical Amendments Act of 1958."

After noting the *Maurer* case and the Tax Court decision in *Chewning*, the Sixth Circuit, in deciding *Morrison*, said (p. 222):

"We realize that the question presented on this appeal is a close one and while we have great respect for the opinion of the Tenth Circuit, we believe that the view we take is the more logical one and that it conforms to the intent of Congress in enacting the legislation."

Out of context, this statement can be read to be critical of *Maurer*. In the context of the holding in *Morrison*, however, it merely says that *Maurer* is not sufficiently strong to overcome the negative inferences drawn from the 1958 Technical Amendments Act respecting losses to *personal* property for *post*-1957 years. The opinion contains nothing critical of *Maurer* as applied to pre-1958 years.²

Later, the Fourth Circuit affirmed the Tax Court's decision in *Chewning*. It said (at p. 441):

"We are persuaded by the able opinion of Judge Atkins that the Tax Court was correct in its interpretation of the Code and that we must reject the reasoning of *Maurer v. United States*, 284

²In *Hall v. United States*, 66-2 USTC Par. 74, and *Killebrew v. United States*, 66-2 USTC Par. 75, both decided August 3, 1966, the Sixth Circuit merely adopted its decision in *Morrison*.

F.2d 122 (10th Cir. 1960) in favor of that of *Morrison v. United States*, 355 F.2d 218 (6th Cir. 1966). While the taxpayers' position was not without some basis in the language of section 1231 prior to the 1958 amendment (Maurer applied the statute as it existed before the amendment), we think that amendment clearly indicated Congress' intention that the taxpayers' loss should not be excluded from treatment under section 1231. The judgment of the Tax Court is therefore Affirmed." (Emphasis supplied)

While the Fourth Circuit's first sentence seems to reject the reasoning of *Maurer*, the second sentence makes it clear that the rejection pertains only to post-1957 years. Further, of course, the rejection would not pertain to business property, since only personal property was involved in *Chewning*.

At first blush, dicta in the Fifth Circuit's opinion in *Waggoner* appears to support the Government's position in the instant case. In disregard of the fact that it had before it only losses to personal property incurred in a year after the effective date of the 1958 Act, that court made the following sweeping statement (at pp. 159-160):

"The legislative history of the enactment of the Internal Revenue Code and subsequent amendments does not support the *Maurer* decision, as evidenced particularly by the amendment to Section 1231(a) which was added by Section 49 of the Technical Amendments Act of 1958 (72 Stat. 1642). By this amendment Congress made it clear that prior thereto all wholly uncompensated casualty and theft losses were covered by Section 1231."

The rest of the opinion, however, makes it clear that

although it expressed an opinion as to *pre-1958* years which were not before it, the Fifth Circuit's dicta should be given no weight in a case involving *income property*:

(i) First, the Court's opinion immediately makes it clear that, despite its sweeping statement, it was focusing on *personal* property. As its first argument in support of the statement, it said (at p. 160):

"The 1958 amendment had the effect of excluding from Section 1231 treatment only wholly uncompensated casualty and theft losses used in the trade or business and of any capital asset held for more than six months and held for the production of income. Congress thus unmistakably showed that it did not wish to exclude from the effect of Section 1231 wholly uncompensated casualty and theft losses on property *not* used in a business or *not* held for the production of income, and the legislative history so reflects." (Emphasis by the Court)

(ii) Second, it seems that the Fifth Circuit did not know that the Treasury's denial of ordinary loss treatment for losses to *business property* was considered by Congress to be an "unintended hardship." The Government's brief before the Fifth Circuit (and before all the other circuits as well), in its extensive treatment of the legislative history, omits the "unintended hardship" language. The Fifth Circuit, in turn, simply incorporated the Government's quotation from the legislative history bodily into its opinion (n. 3, p. 160) with exactly the same omissions and even the same italics. The

Fifth Circuit was thus apparently entirely unaware that Congress considered the Treasury's discrimination against self-insured businessmen as "unintended," and that *Maurer* served to prevent the "unintended hardship."

(iii) Finally, the Fifth Circuit's reliance upon the Treasury's regulations provides a third reason for giving its dicta no weight in a case involving losses to income property. The Court said (at p. 161):

"... Important also is the consistent maintenance of the Treasury's view over a period of twenty-two years, as shown by its regulations since 1943, which Congress has not seen fit to change."

The Court's reference to regulations "unchanged" clearly indicates its focus on losses to *personal* property, because the 1958 Technical Amendments Act had, by the time of *Waggoner*, reversed the Treasury's position respecting losses to *income* property.

The Government concludes its affirmative argument based on case law with two brief arguments (numbered 1 and 2, Govt. Br. 26-27) which are essentially a restatement of its earlier contention (Govt. Br. 19-20) that Congress, when amending § 1231(a) in 1958, assumed that its original meaning was the same as that proclaimed by the Government in this case. We have already pointed out that in 1958 Congress was confronted with the practical problem of dealing with a Treasury administrative practice which Congress believed imposed an "unintended hardship."

For all practical purposes affecting the welfare of taxpayers, the statute then meant what the Treasury said it meant. Neither the Congress nor taxpayers could then know that the Tenth Circuit would soon declare the hardship imposed by the Treasury as “unintended.”

D. The Soundness of *Maurer* Is Indicated by the Weakness of the Government’s Attacks on It.

The Government has not attacked the *Maurer* rationale head-on. It has not directly responded to the Tenth Circuit’s reasoning (i.e., that a statute which literally requires a conversion “into other property or money” should not be applied in a case where property is simply lost and no other property or money received to replace it).

Rather, the Government’s attack, while ingenious, is of an indirect or collateral nature. It separates expressions used by the Tenth Circuit from the context of its whole rationale and attacks the isolated expressions one by one. The Government thereby claims to find in them erroneous concepts and non sequiturs. It seeks to undermine this Court’s confidence in the Tenth Circuit’s general grasp of the Internal Revenue Code without really coming to grips with the Tenth Circuit’s theory. A brief consideration of the Government’s six arguments (Govt. Br. 27-36) should suffice to show that the alleged errors and non sequiturs simply reflect misconstructions of the Tenth Circuit’s language resulting from its consideration in isolation from context.

1. The Government's principal attack (Govt. Br. 27-29) is made upon the Tenth Circuit's statement that §§ 165 and 1231(a) are "mutually exclusive." The Government correctly points out that § 165 provides the essential authorization for deduction of losses. Therefore, it must apply to the loss whether or not § 1231(a) applies. Section 1231(a), if it applies, merely determines the character of the losses (i.e., whether capital or ordinary). In this sense, § 165 and § 1231(a) work together and are not mutually exclusive. However, the issue in *Maurer* was not deductibility, but solely the *character* of the loss. When § 1231(a) applies, it *exclusively* determines the character of the loss. When § 1231(a) does not apply, the field is left exclusively to § 165. Thus, in determining the *character* of loss, as in *Maurer*, these sections do not operate together and may correctly be said to be mutually exclusive. Accordingly, there is no good reason to assume that the Tenth Circuit misconceived the relationship between them. Strong evidence that it did not misconceive the relationship is the fact that it properly reasoned to its conclusion about the character of the loss by construing the language and legislative history of § 1231(a). It did not construe § 165 and conclude that its applicability excluded the applicability of § 1231(a). As a result, even if we were to assume, *arguendo*, that the Tenth Circuit misconceived the §§ 165-1231(a) relationship, the misconception would be irrelevant, since it is patently clear from its opinion that the Tenth Circuit ar-

rived at its decision in *Maurer* by construing the language and legislative history of the proper statute, § 1231(a).

2. The Government's second, third and fourth attacks (Govt. Br. 30-35) are directed against expressions from the context of the Tenth Circuit's reasoning about the legislative history of § 1231(a). The Tenth Circuit reasoned that the literal requisite for applying § 1231(a) (that there be an involuntary conversion of property "into other property or money") is supported by the legislative history, which indicates that when enacting § 1231(a), Congress had in mind property seized in furtherance of the World War II effort. Since such seizures were compensated, it was natural for Congress to have addressed itself to compensated seizures, and these are analogous (or, in the Tenth Circuit's language, "contextually similar" or "closely akin") to a sale or exchange for which capital treatment is the general rule. Where, however, the taxpayer receives nothing in return for his property, there is no analogy to a sale or exchange and, consequently, a lack of support for application of § 1231(a). The Government has seized upon short expressions employed by the Tenth Circuit in the course of such reasoning and used them, in its second and third attacks (Govt. Br. 30-31) to support the argument it made in the first attack (about the §§ 165-1231(a) relationship), which we dealt with above and will not further belabor. In its fourth attack (Govt. Br. 31-35), the Government reproaches the Tenth Cir-

cuit for such expressions as “contextually similar” and “a compensated loss is a taxable event closely akin to a sale or exchange.” The Government proceeds with the argument as if the Tenth Circuit’s conclusion “rested upon a erroneous assumption . . . that § 1231 capital loss treatment may apply only where there is a sale or exchange” (Govt. Br. 32). This is another misconstruction of the Tenth Circuit’s meaning. The Tenth Circuit, in fact, relied upon the literal language of § 1231(a) requiring a conversion into “other property or money.” It analogized a compensated loss to a sale or exchange only to show that Congress’ use of the “other property or money” language was probably intentional and not inadvertent. Thus, the Government’s attack suffers from the defect of considering isolated expressions out of context and treating them as if they were employed to prove much more than the Tenth Circuit actually employed them to prove.

The Government’s fifth attack (Govt. Br. 35) is again essentially a repetition of its first. Its sixth, and last argument (Govt. Br. 35-36) simply chides the Tenth Circuit for not being persuaded by the Government’s argument based on its regulations.

It can be seen that the essential characteristic of all the Government’s attacks on the Tenth Circuit’s rationale is a failure to meet the rationale head-on, i.e. a failure to face the Tenth Circuit’s recognition that property destroyed without compensation is simply lost and therefore not converted “into other property or money” as the statute expressly requires.

III

**THE GOVERNMENT HAS ARGUED BEFORE THE
SUPREME COURT THAT MAURER IS DIS-
TINGUISHABLE FROM THE POST-1957 CASES**

In addition to distinguishing the instant case because it involves income property, we have argued that this case, like *Maurer*, is distinguishable from the post-1957 cases because it involves years prior to the effective date of the 1958 Act. The Government concedes that it has made the same argument before the Supreme Court (Govt. Br. 25). Its exact words in a memorandum in opposition to the taxpayer's petition for certiorari in *Chewning v. Commissioner*, *supra*, were (pp. 3-4):

“Petitioner argues that the instant decision conflicts with *Maurer v. United States*, 284 F.2d 122 (C.A. 10). However, that case involved a pre-1958 casualty loss. Therefore, the language of the statute at the time of the transaction involved in *Maurer* was materially different from the statute here in question. There is no conflict among the courts of appeals as to the meaning of § 1231 as amended in 1958.”

Notice that the Government did not say that *Maurer* was wrong. It simply distinguished it. To distinguish cases is to say that each can be correct notwithstanding the other. Having told the Supreme Court that *Maurer* is distinguishable from the later cases, the Government should not now be heard to say to the contrary.

Respectfully submitted,

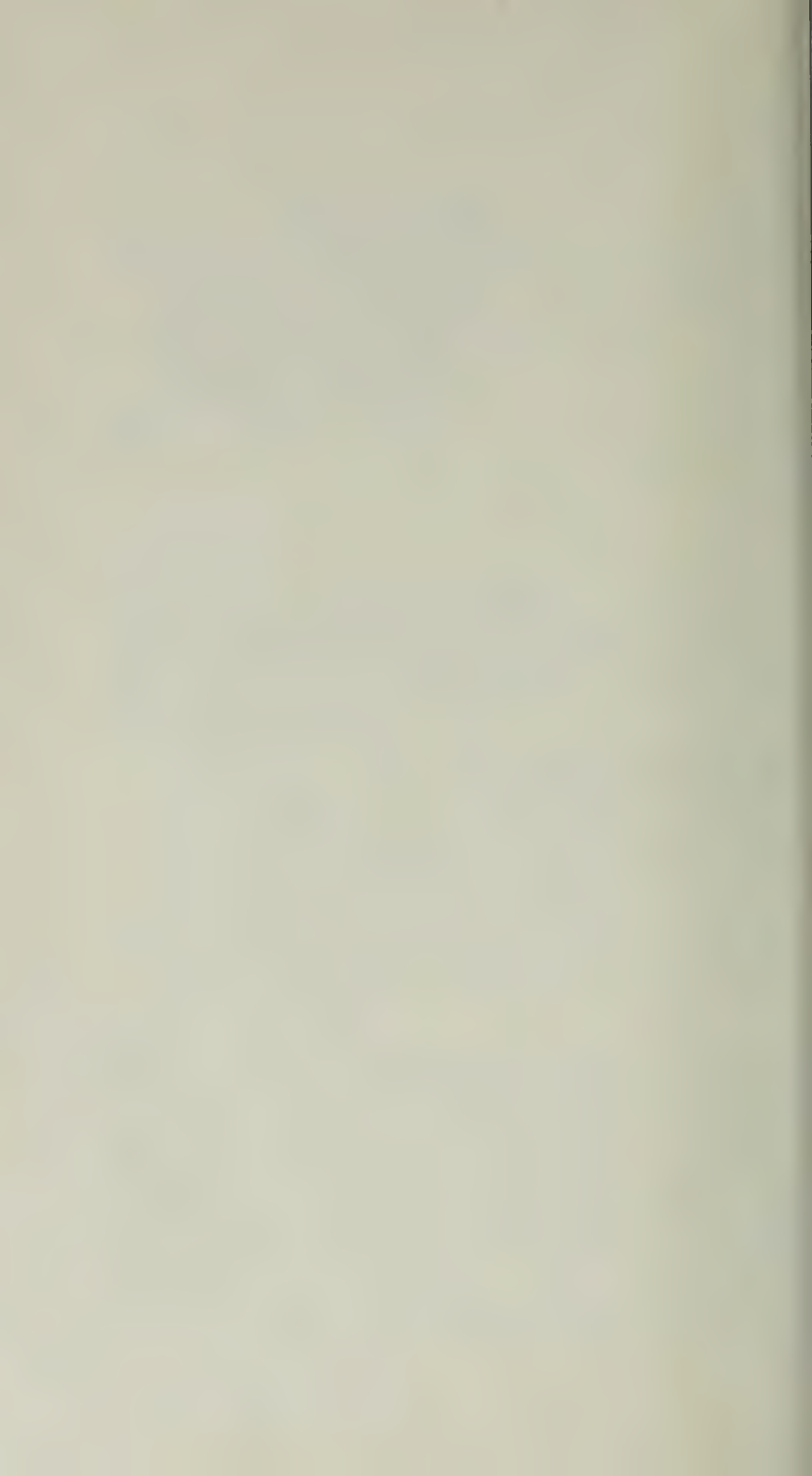
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 28th day of February, 1968.

.....
 JOHN T. PIPER, Attorney.



No. 21,834-A

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

WEYERHAEUSER COMPANY,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

FILED

APR 12 1968

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In its answering brief as cross-appellee on the issue involving treatment of the casualty losses to its equipment the taxpayer advanced certain arguments which we believe require comment.

1. Throughout its argument, the taxpayer emphasized that we are dealing here with losses to income-producing property of the type which, under the 1958 amendment to Section 1231, is excluded from its cover-

age. In this connection it should be noted that the statute prior to the 1958 amendment offers no basis whatsoever for any distinction between income-producing (including business) property and property held for personal use—nor does the taxpayer suggest any. Consequently, the taxpayer must stand or fall on the sole argument that *all* wholly uninsured casualty losses, regardless of the purpose for which the property was held, are excluded from the pre-1958 statute.

2. In support of its contention that wholly uninsured losses are excluded from the pre-amendment statute the taxpayer necessarily places sole reliance upon the appearance therein of the phrase “into other property or money” since there is nothing else which could even suggest such an exclusion. In our opening brief on this question (p. 26) we pointed out that the statute, as amended in 1958, made no alteration in the language of the first paragraph of Section 1231(a), in which the phrase in question appears, and yet was expressly stated by the 1958 Congress to cover wholly uninsured losses other than those expressly excluded by the new subparagraph (a) (2) added by the amendment—a coverage which has been approved and applied by the Fourth, Fifth and Sixth Circuits. *Chewning v. Commissioner*, 363 F. 2d 441, certiorari denied, 385 U.S. 930; *Campbell v. Waggoner*, 370 F. 2d 157; *Morrison v. United States*, 355 F. 2d 218, certi-

orari denied, 384 U.S. 986. The taxpayer has offered no suggestion as to how this Court could construe the phrase "into other property or money" as necessarily excluding all wholly uninsured losses from the pre-1958 version of Section 1231, while the same language, unchanged, does not exclude them from the amended statute. It is to be noted that the exclusion of uninsured losses to income-producing property is accomplished in the amended statute by the insertion of a new sentence at the end of Section 1231(a), which necessarily implies that, without that addition, Section 1231(a), including the phrase "into other property or money", would include uninsured losses to property held for that purpose, just as it includes uninsured losses to property held for personal use. The contrary view would make subparagraph (a)(2), and the 1958 amendment, a nullity. Thus, the taxpayer asks this Court to adopt a construction of the critical phrase as used in the pre-1958 statute which is directly opposed to that which it must be given in the statute for years after 1958. While asking this Court to sustain its position on the basis of dubious conjecture from remote indicia, the taxpayer carefully skirts these unanswerable basic considerations.

3. One of the peripheral considerations upon which the taxpayer seeks to place great stress is the

reference in the Committee Report accompanying the 1958 amendment (see Taxpayer's Br. pp. 32-33) to the exclusion of wholly uninsured losses to business and income-producing property in the pre-1958 statute as an "unintended hardship". The taxpayer would have this Court interpret that as an expression of belief by the 1958 Congress that the 1942 Congress, which enacted the original version of the predecessor of Section 1231(a), did not intend wholly uninsured losses to be covered under that provision. That is neither a necessary nor a reasonable interpretation of the comment in the 1958 Committee Report. The taxpayer fails to distinguish between the 1942 Congress' intentions as to the coverage of the statute and, on the other hand, its lack of awareness (and, hence, of intention) with respect to possible hardship from the inclusion under the comprehensive language of the statute of wholly uninsured losses to business and income-producing property. What the 1958 Congress obviously meant was that, as is so often the case when a provision of comprehensive coverage is subsequently amended to exclude certain theretofore covered circumstances, the 1942 Congress had not focused on the possible effect of the provision upon uninsured losses to income-producing property, as opposed to property of a personal nature, and therefore had made no provision for exclusion of the former—thus necessarily including them.

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Hence it was the “hardship” from the inclusion—not the inclusion itself—which was “unintended”.

Contrary to the taxpayer’s casual assumption (Br. 31, 33), there is no reason to believe from the comments in the 1958 Committee Report that that Congress (1) regarded the Treasury Regulations as the initiator of, or the sole authority for, the inclusion of wholly uninsured losses in the pre-1958 statute, (2) believed this inclusion was contrary to the intent of the 1942 Congress or (3) had any doubt that the language of the statute itself required this inclusion. We point to the very paragraph of the 1958 Committee Report cited by the taxpayer (Br. 32) for the statement that the Congress was *amending* (i.e., changing) the pre-1958 statute—not *clarifying* it so as to correct what the taxpayer alleges to be an incorrect construction in the Treasury Regulations. We also point again to the fact that if the phrase “into other property or money” was intended in the original enactment to exclude wholly uninsured losses, it necessarily excluded those to property held for personal use as well as property held for production of income. If the 1958 Congress believed that the language necessarily had this effect it would scarcely have left the very same language in the amended statute which it expressly intended to cover uninsured losses to all property with the

exception of that held for business and income-producing purposes.

Furthermore, since the 1958 Congress was of the view that the pre-amendment statute included *all* uninsured losses and acted on the belief that special exclusionary language was required to take certain types out of the coverage of the statute for years thereafter, it was, a fortiori, well aware of the fact (and so stated) that uninsured losses to business and income-producing property were (whether by force of the statute alone or as construed in the Treasury Regulations) included for years prior to the amendment. Had it wished to change that coverage it could, and would, have made its exclusionary amendment retroactive. It chose not to do so, but expressly made the change effective only for tax years beginning after December 31, 1957. The taxpayer is here asking this Court to do what the Congress, in full awareness of the situation, could have done, but chose not to do.

4. In attemptation to escape the impact of the decisions of the Fourth, Fifth and Sixth Circuits, *supra*, insofar as they bear upon the coverage of the pre-1958 statute, the taxpayer makes the following errors:

(a) Further compounding its unwarranted "unintended hardship" approach, the taxpayer asserts (Br. 39) that the purpose and effect of the Tenth Circuit's

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4. In attemptation to escape the impact of the decisions of the Fourth, Fifth and Sixth Circuits, *supra*, insofar as they bear upon the coverage of the pre-1958 statute, the taxpayer makes the following errors:

(a) Further compounding its unwarranted "unintended hardship" approach, the taxpayer asserts (Br. 39) that the purpose and effect of the Tenth Circuit's

decision in *Maurer v. United States*, 284 F. 2d 122, was to prevent the “unintended hardship” referred to by the 1958 Congress. But, since that hardship was stated to be only with respect to business and income-producing property, it would be remarkable indeed for the Tenth Circuit to have relieved the hardship in question by holding as excluded from the statute the very type of property as to which the 1958 Congress found no hardship.

(b) As we pointed out in our main brief (pp. 23-24) the Fourth, Fifth and Sixth Circuits have stated their disagreement with the rationale of *Maurer* with respect to the coverage of the pre-1958 statute. The taxpayer now suggests (Br. 36-37) that this disagreement is only with respect to the coverage of the statute in years after the 1958 amendment. This is hardly possible since in *Maurer* the Tenth Circuit did not even mention or acknowledge the 1958 amendment, and its holding was directed solely to the unamended statute as enacted in 1942. Hence any disagreement expressed by the other circuits with *Maurer* could only have been with respect to its views as to the pre-1958 provision. Moreover, a reading of the opinions of the Fourth, Fifth and Sixth Circuits makes it very clear that their disagreement with the Tenth Circuit was in support of their holding that the statute, from its

original enactment in 1942, had covered all wholly uninsured losses and that the 1958 amendment had acted only to exclude those to income-producing property.

(c) Finally the taxpayer seeks to deny the obvious conflict between the Tenth Circuit and the other Circuits with respect to the pre-1958 coverage by suggesting that the expressed disagreement of the latter with the *Maurer* rationale was only dicta because those courts there had before them only losses to property held for personal use, whereas we are here concerned with business property held for the production of income. But the taxpayer ignores the fact, *supra*, that there is no possibility for distinction under the pre-1958 statute between property held for production of income and property held for personal use. Therefore the other Circuits' disagreement with *Maurer*, to the extent that, as reflected in those opinions, it was basic to their comprehensive holding that the phrase "into other property or money" never had the effect of excluding uninsured losses, could not have been dicta.

5. The taxpayer seizes on certain comments in the Government's opposition to the petition for certiorari of the taxpayer in *Chewning v. Commissioner*, *supra*, as support for its contention that the *Maurer* decision is not in conflict with those of the Fourth, Fifth and

Sixth Circuits, but distinguishable. However, the Government, as is apparent from the very language quoted from its memorandum in opposition (see Taxpayer's Br. 44) did not say that there was no conflict between the Tenth Circuit and the other Courts of Appeals, or that *Maurer* was distinguishable, but only that there was no conflict with respect to the coverage of the *amended* statute—that being the only question of sufficient continuing importance to require Supreme Court review. The “materially different” language referred to was the addition of the new sentence to subsection (a).

6. We will not undertake an analysis of the arguments by which the taxpayer attempts (Br. 40-43) to question the demonstration in our main brief (pp. 27-36) of the many patent misconceptions which led to the error of the *Maurer* decision. We are content to leave the question to this Court upon a reading of the *Maurer* opinion in the light of the respective comments offered by the parties and of the comments of the Fourth, Fifth and Sixth Circuits. Suffice it to say that the Congress and the three other Courts of Appeals have reached conclusions with respect to the coverage of the pre-1958 statute, and the meaning to be accorded the phrase “into other property or money”, directly contrary to those which underlie the holding by the

Tenth Circuit in *Maurer* upon which the taxpayer places sole reliance.

Respectfully submitted,

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March, 1968

CERTIFICATE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of, 1968.

United States Attorney

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**MOD CARRIERS' AND CONSTRUCTION LABORERS' UNION,
LOCAL No. 300, AFL-CIO, RESPONDENT**

**On Petition for Enforcement of Orders of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
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AUG 30 1967

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,837

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOD CARRIERS' AND CONSTRUCTION LABORERS' UNION,
LOCAL No. 300, AFL-CIO, RESPONDENT

**On Petition for Enforcement of Orders of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*), for enforcement of an initial remedial order and a subsequent order fixing backpay, issued on February 11, 1964, and June 23, 1966, respectively,

against respondent, Hod Carriers' and Construction Laborers' Union, Local No. 300, AFL-CIO. The Board's Decisions and Orders (R. 24-25, 11-18 and 67-68, 34-57)¹ are reported in 145 NLRB 1674 and 159 NLRB No. 103. This Court has jurisdiction of these proceedings, the unfair labor practices having occurred at Los Angeles, California, within this judicial circuit.²

¹ References to Volume I, containing the pleadings, the Board's decision and order, etc., are designated "R."; references to reproduced portions of the testimony as "Tr."; and to the parties' exhibits as "Ex." References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

² The unfair labor practices involve employees of Desert Pipeline Construction Co., a California corporation, which is a member of Southern California Chapter of Associated General Contractors of America, herein called AGC. AGC negotiates collective-bargaining agreements on behalf of its members with labor organizations including Southern California District Council of Laborers and its members, including respondent. AGC members with their principal offices and places of business in the State of California, annually ship goods and perform services outside the State of California valued in aggregate in excess of \$50,000. They also annually receive goods and services valued in excess of \$50,000 directly from outside the State of California and from other California enterprises which annually receive goods and services valued in excess of \$50,000 directly from outside the State of California (R. 12, 24; Tr. 8-9). On these admitted facts, the Board's jurisdiction is clear. *N.L.R.B. v. Hod Carriers, etc., Common Laborers' Union, Los Angeles Local 300*, 336 F. 2d 459 (C.A. 9), enf'g. *per curiam*, 128 NLRB 969, 971, 991; *Leonard v. N.L.R.B.*, 197 F. 2d 435, 436 n. 1 (C.A. 9); *Katz v. N.L.R.B.*, 196 F. 2d 411, 418 (C.A. 9).

STATEMENT OF THE CASE

I. The Board's Findings and Conclusions

The Board found in the initial unfair labor practice proceeding that the Local caused an employer to discharge its employees Murray and Dalton in violation of Section 8(a)(3) of the Act, thereby violating Section 8(b)(1)(A) and (2). In the subsequent backpay proceeding, the Board further found that Murray and Dalton are entitled to backpay—including fringe benefit payments to be made in their behalf—in the amounts of \$1,658.06 and \$78.41, respectively. The Board based its findings on the following facts:

A. The Union causes Desert to lay off Murray and Dalton

At all material times, the Union and Desert Pipeline Construction Co. were parties to a master labor contract and a memorandum of understanding (R. 12-13; R. Exs. 1, 2, Tr. 111-112).³ This arrangement, which the Board found lawful, provided that Desert might bring into Local 300's area jurisdiction no more than three so-called "key men" to do laborers' work and would have to obtain any further needed labor from the Local (R. 13, 24; R. Ex. 1, Tr. 64, 31, 39). For 2 weeks prior to April 5, 1963, Desert, while laying gas pipe on streets and driveways in Los Angeles, had been operating with five laborers—namely, Rodriguez, Lopez, Gonzales, Dalton, and Murray—who were members of Local 507, a sister

³ See note 2, *supra*.

local (R. 13, 24; Tr. 16, 17, 25-26, 46, 62, 84). Along with a welder and a truckdriver, all worked under Foreman Richardson (R. 13, 24; Tr. 19, 25, 55, 16, 28, 131).

On the morning of April 5, the crew was working at Rexford Drive when Joseph Young Murdock, assistant business manager of the Union, called at the jobsite. In answer to his inquiry as to the number of laborers on the job, Foreman Richardson told him there were five. Murdock walked over and spoke to each laborer and checked his dues record (R. 13, 24; Tr. 16-18, 47, 77, 113, 134). Murdock next turned to Richardson and said that he had seen a sixth laborer "run around the corner," but when Richardson denied this, Murdock added that the contract permitted only three "key men" (R. 13; Tr. 18-19, 27, 77, 113). He next told the five laborers to climb out of the holes in which they were working and the men did so (R. 13, 24; Tr. 19-20, 48, 77, 114, 120). Gonzales asked Murdock why the job was shut down and Murdock replied by telling him to go over, and sit down, and shut up (R. 13, 24; Tr. 78, 86). Murray then asked Murdock the same question and Murdock told him the same thing. Murray, however, told Murdock that he had the right to shut the job down, but not to tell him to go over, sit down, and shut up, and when Murdock repeated his direction, adding the appellation, "boy", Murray protested that he was not a boy. Murdock then told Murray he had better go over and sit down before Murdock "whittled him down to size" (R. 13, 24; Tr. 79, 98-99). A heated argument lasting 2 or 3 minutes followed, the men

“had a nose-to-nose talk there for a bit” and Murray told Murdock, “I would fight him with words or fists” (R. 13 n. 6, 24; Tr. 48, 79, 124, 132-133).⁴ Dalton, who had been across the street and 60 feet away talking to a householder, now came over. He urged Murray not to argue, lest he get them all into trouble, and Murray thereupon turned away and walked off with Dalton. Murdock remained standing there, angry (R. 13 n. 6, 24; Tr. 48-49, 79-80, 134).

A few minutes later, Murdock telephoned Desert’s president and general manager, Floyd Smith. Murdock told Smith that an improper number of key men were on the job, and that his foreman had not been cooperative in the matter. He also complained that Murray and Dalton had been uncooperative and that he had had trouble with Dalton on a prior job (R. 13; Tr. 22, 117-118, 145-146, 150, 159, 162, 165). Murdock added that both Murray and Dalton had been disrespectful or abusive or uncooperative and that “these two men had to go” (R. 13-14, 24; Tr. 150, 148, 151, 158, 162). Smith asked Murdock to go back to the jobsite and speak to Richardson (Tr. 118). He also called Richardson by radiotelephone and told him to see what he could work out with Murdock (R. 14, 24 n. 7; Tr. 21-22).

Murdock went back to the jobsite and told welder Rudy Chavez, Richardson’s leadman, “You can have three men according to the agreement, and you can

⁴ Murdock, 48 years old, 6 feet 11½ inches tall, and weighing 225 pounds, is a former amateur boxer; Murray, 5 feet 10½ inches tall, weighs 185 pounds (Tr. 95, 131-132, 142).

put on three men according to the agreement, except Murray and Dalton (R. 14, 24; Tr. 80-81, 89).

A short time later, while the job was still shut down pursuant to his instructions and the crew stood around listening, Murdock told Richardson that he could have only 3 laborers from Local 507 (R. 14, 24; Tr. 23-24, 52, 66, 81-82, 120, 122). Richardson, in accordance with his regular practice, said he would like to keep those with most seniority, and named Lopez, Gonzales, and Dalton—the men who in fact had the greater seniority (R. 14, 24; Tr. 24, 40, 52, 56-57, 82, 121-122, 127, 203-204, 261, 265, 268-269, G.C. Exs. 3D p. 2, 3E p. 2, 3B p. 2, 3A p. 2, 3C p. 2). Murdock replied that he would not let the job resume “under those conditions.” Richardson asked what conditions he required, and Murdock explained that the work could go on only “as long as Dalton and Murray are not working” (R. 14, 24; Tr. 24, 41, 51-52, 57, 71, 82).

During his conversation with Richardson, Murdock claimed that Dalton had called him a name while Dalton was talking to the householder on the other side of the street (R. 14 n. 9, 24; Tr. 54, 58-60, 73-74). He also said that he had had trouble with Dalton on a job in Venice, California, 4 years before (R. 14 n. 9, 24; Tr. 54, 58). Dalton told Murdock that he had never had trouble with him in Venice 4 years before, and that he had not been working in Venice at that time. He further denied Murdock’s claim that he had called him a name on that day or at any other time. Murdock made no reply (R. 14,

24; Tr. 54, 68).⁵ Richardson dismissed Dalton and Murray and the job resumed about an hour after the shutdown, with Lopez, Gonzales, and Rodriguez continuing at work (R. 14, 24; Tr. 24, 30, 38, 52-53, 66, 121, 127, 154).

The Board found that although Murdock lawfully demanded that Desert discharge two employees, the selection of Murray and Dalton was the result of Murdock's demand that *they*—rather than any other men—be discharged or the job would be shut down. The Board further found (R. 14, 24) that Murdock was angry at Murray because of the argument—which began when Murray asked why he was being told to stop work—and was angry at Dalton because he sided with Murray, because Murdock believed he had had “trouble” with Dalton on another job several years before, and because he believed Dalton had called him a name. Accordingly, the Board found that under the circumstances here, the Union's demand for their discharge violated Section 8(b) (2) and (1) (A) of the Act.

B. The events after the layoffs

On April 10, 1963, 5 days after Murdock's visit, Rodriguez, one of the retained key men, transferred from Local 507 into the Union (R. 41, 68; Tr. 275). This left only two imported laborers on Richardson's crew and Richardson was free to hire a third imported man under the memorandum of understand-

⁵ The Board credited Dalton's testimony that Murdock's accusations were in fact false (R. 14, 24; Tr. 54, 61).

ing. On the same day that Rodriguez transferred into Local 300, Dalton was rehired by Desert and resumed his post as a laborer on Richardson's crew at the Rexford Drive project (R. 41, 68; Tr. 358, G.C. Ex. 4A). He was without work during the 5-day interim (R. 41, 49, 68; Tr. 217-219).

On April 9, Murray registered for work with Local 507 in which he held membership (R. 41, 68; Tr. 286, 297, 360). On April 11, he transferred his membership into Local 300 and registered with it for work (R. 41, 68; Tr. 286, 290, 297, 299, 303, 359, G.C. Ex. 5). At the time of transfer into the Union, he told Renteria Manuel, Local 300's secretary-treasurer, that he needed a job clearance and Manuel told him to go "upstairs" to see another union representative for this purpose (R. 41, 68; Tr. 287). Murray went upstairs, passed through a secretary's office and reached the office of the "head man" whom he was to see, namely, Ray Waters, the Local's business manager (R. 41-42, 68; Tr. 287-289, 303-304, 351).⁶ Murray told Waters that he wished a job clearance for the Rexford Drive project and Waters replied that Murray would have to present a written request for dispatch, signed by Desert's superintendent and designating him by name (R. 41-42, 68; Tr. 288).

⁶ Murray recalled speaking upstairs to a "Spanish [looking] fellow" whose name he could not recall. However, the Board found that he had confused Ray Waters with one "Lupe" who had signed his membership book at the time of the transfer. The Board noted that the only office "upstairs" which one passed through a secretary's anteroom in order to reach was that of Waters (R. 41-42, 68; Tr. 287-290, 303-304, 351-353, G.C. Ex. 5).

Waters' instructions to Murray were pursuant to the master labor contract, which requires Local 300 to maintain a nondiscriminatory "employment facility" from which it shall dispatch qualified and competent registrants for work to meet contractors' requests (R. 46, 68; G.C. Ex. 2, pp. 608-609, Art. II D 5-7). The contract further provides (R. 46, 68; G.C. Ex. 2, p. 609, Art. II D 7) that

. . . The order of preference in the dispatchment of applicants for employment is as follows:

Group A: Applicants whom a Contractor requests by name who have been laid off or terminated from employment of the type covered by this agreement and in the area served by the employment facility within 270 days before a request from the same Contractor who laid off or terminated them, provided they are available for employment.

* * * *

Murray obtained such a written request from Company Superintendent John Roberts, returned to the Union hall, and handed it to Waters (R. 42, 68; Tr. 62, 78-79, 288). While Waters was reading the request, Murdock, who had a desk in another office nearby, came into Waters' office, took Waters to a distant corner of the room, and spoke to him briefly while both glanced over at Murray. After this, both returned and Waters told Murray he "couldn't have" the job clearance (R. 42, 46, 68; Tr. 288, 253).

Murray renewed his registration for work each week thereafter and responded to weekly rollcalls of

registered men (R. 43; Tr. 277-279, 322). Since almost 400 men had registered before him, his number was never reached (R. 43; Tr. 278). During the week ending April 21, 1963, Murray returned to work with Desert, but without the Union's job clearance (R. 42; Tr. 291, 277-278, 280-281, G.C. Ex. 3A p. 1). He was assigned to Foreman Buford Lilly's pipeline crew. About 2 or 3 days later, while Murray was at work, "Jitterbug" Jackson, a business agent for Local 300, came up to Murray, stated that he was the Local's business agent, exhibited his union identification card, and asked, "You're Murray, aren't you?" When Murray said he was, Jackson asked to see his union membership book (R. 43, 68; Tr. 292-293, 319-321, 367; G.C. Ex. 3A p. 1).⁷ Jackson did not ask Murray to show a job clearance or referral (R. 43; Tr. 300, 301). After verifying Murray's identity, Jackson told Lilly to lay Murray off. Lilly replied that if Jackson wanted Murray off the job, Jackson would have to tell Murray to get off (R. 43, 68; Tr. 292, 293, 320-321). Jackson then declared that if Lilly failed to lay off Murray, he would shut the job down. When Lilly persisted in his refusal and Jackson repeated his threat, Murray intervened. He asked whether Jackson would permit the job to con-

⁷ Murray's fellow workmen identified the one who had exhibited his union credentials as "Bee Pop or Ditty Pop or something like that" and it is conceded that the Union employed a business agent known as "Jitterbug Jackson" at the time. The Board inferred, from the allusion to popular dance music common to both nicknames, that it was Jackson who figured in this incident (R. 43, 68; Tr. 321, 367).

tinue if he left, and upon Jackson's saying yes, quit the jobsite (R. 43, 68; Tr. 293).

Between April 28, 1963, and February 12, 1964, Murray got jobs elsewhere (R. 44, 68; Tr. 217-219, 293-294; G.C. Ex. 1(b) p. 3).⁸ On February 12, 1964, Desert again hired him as a laborer and he worked for Desert and its parent corporation and successor, Cabildo Corporation, more or less regularly thereafter (R. 44, 68; Tr. 180-181, 205-206, 217-219; G.C. Ex. 1(b) p. 4; G.C. 3A p. 2).

C. The backpay computations

The correctness of the Board's arithmetical calculations, discussed below, is not in dispute. The Union has not yet notified the employer, however, in the form which the Board's order requires, that it has withdrawn its objections to the continued employment of Murray and Dalton, nor has it complied with the Board's requirement that it request that they be rehired (R. 16, 17, 24, 49, 68; G.C. Ex. 1(b), par. C). Determination of the Union's backpay obligation for all periods after March 31, 1965, has therefore been reserved (R. 49, 68; G.C. Ex. 1(b) p. 1 Par. A).

The parties had stipulated the correctness of the record basis and arithmetical calculations upon which the General Counsel's backpay specification was based. The Board found, however, that the specification alleged a cognizable time loss of 7½ hours for Dalton on April 5, whereas he actually lost only 6½

⁸ References to G.C. Ex. 1(b) are solely to the backpay specification, submitted as an exhibit during the backpay proceeding.

hours' work that day (R. 49, 68). As noted, Dalton, discriminatorily laid off on April 5, 1963, was rehired April 10 and had no interim work or earnings (p. 8). In determining his gross earnings loss for this period, the Board found that the statutory purposes would be served by the conventional formula of multiplying his hourly pay rate by the number of hours of work he lost (R. 49, 68).

With respect to Murray, the Board found (R. 44, 68) that since Foreman Richardson selected him for layoff in order to comply with the contract obligation permitting only three key men to be retained, Murray initially suffered no actual loss as a result of the Union's discriminatorily motivated selection of Murray and Dalton as the persons to be laid off. The Board further found, however, that when for the same discriminatory reasons the Union prevented Murray's returning to work after he transferred his membership and became eligible for referral, it caused him loss of wages for which it was accountable. As stated (p. 8), Murray transferred into the Union on April 11, thereby becoming qualified on that day for preferential dispatch to his former job. On the assumption that Desert would have directed him to report for work the following morning had the Union dispatched him that day as requested, the Board found that backpay losses, in his case, should be computed from April 12 (R. 50, 68).⁹

⁹ Murray first began working for Desert in June 1962. By January 1963 he acquired enough seniority to be receiving practically steady work with Foreman Richardson's crew (R. 38, 68; Tr. 203-204, 355-357; G.C. Exs. 2, 3A p. 1), and

The Board adopted the General Counsel's general formula, set forth in the backpay computation (R. 50, 68, G.C. Ex. 1(b) pp. 2-3, Tr. 234-235), whereunder the measure of Murray's quarterly gross earnings during the backpay period was generally the hours worked quarterly by Rudolfo P. Gonzales, a laborer on Desert's Rexford Drive pipeline project. Since Gonzales did not work full time during the third quarter of 1963, however, the Board used the hours worked in that quarter by Raymond D. Lopez, another laborer on the project (R. 50-51, 68).¹⁰

In using the respective number of hours worked by Gonzales and Lopez as the measure of Murray's losses, the Board noted that the laborers each received the same benefits (R. 50, 68; G.C. Ex. 1(b) par. G, 102, R. Ex. 2, pp. 634-635 Art. XV D. E.). In addition, their respective classifications as laborers and pneumatic tool operators are routinely interchangeable in that the workers work comparable hours and

as noted *supra*, once the Union's direct intervention ceased, he resumed such work.

¹⁰ Because of the General Counsel's misapprehension that five laborers were receiving the same pay rate, the backpay specification sought to use the quarterly earnings of Gonzales and Lopez, respectively, as the specific measure of gross backpay. The Board found, however, that Murray, classified as a laborer when discriminatorily laid off, was being paid \$3.26 per hour under the contract, while Gonzales and Lopez, classified as pneumatic tool operators, received \$3.47 (R. 50, 68; R. Ex. 2, p. 635; Tr. 231-232, G. C. Ex. 4A). The Board recomputed accordingly, further making due allowance for the fact that the contract rate for laborers increased from \$3.26 to \$3.36 per hour on May 1, 1963 (R. 51-52, 68, R. Ex. 2, p. 635).

perform similar tasks. Workers performing tasks within both classifications are paid the higher contractual rate, set for pneumatic tool operators, if they spend more than a specified minimum time working within the classification designated (R. 51, 68; Tr. 233, 281-282, 358). Murray had worked as a pneumatic tool operator for Desert before his discharge (R. 39, 68; Tr. 295, 318, 358).

II. The Board's Order

In its original, remedial order (R. 16-18, 25), the Board directed that the Union cease and desist from causing or attempting to cause Desert to discriminate against employees in violation of Section 8(a)(3) of the Act; or in any other manner restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the Board required the Union to make the two employees whole, to notify them and Desert that it has no objection to their employment, to request Desert to rehire them, and to post the customary notices.

In its backpay order (R. 24, 68), the Board ordered that the Union make whole Dalton and Murray by payments to them directly of net backpay, and payments on their behalf to fringe benefit funds, with interest, as of March 31, 1965, as follows:

Discriminatee	Net Backpay	Health and Welfare Fund	Joint Pension Trust Fund
Philip J. Dalton	\$ 73.55	\$ 2.81	\$ 2.25
Dennis R. Murray	1,336.07	179.44	143.55

ARGUMENT

I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Union Violated Section 8(b)(2) and (1)(A) of the Act by Causing Desert to Discriminate Against Dalton and Murray

A union and an employer may, of course, lawfully agree to an exclusive hiring hall, requiring an applicant for employment to obtain union clearance as a condition to employment, provided that the hiring hall is operated on a nondiscriminatory basis.¹¹ As a necessary corollary to this right, the union may lawfully refuse referral, or seek the discharge of an employee who has been employed in violation of the agreement, despite the general prohibitions of Section 8(b)(2) and (1)(A) of the Act. "However, if the union's action, directed to an employer, was intended to discipline an individual . . . for violation of union rules, or to encourage individuals to accept the authority of union officers, . . . such action constitutes an unfair labor practice. . . ." *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 733-735 (C.A. D.C.) (footnotes omitted). Accord: *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 25-26, 40-42 (Congress, by enacting Section 8(b)(2) and (1)(A) sought to prevent an employer from being "obliged to discharge an employee because the union does not like him.") See, *N.L.R.B. v. United Brotherhood of Carpenters & Joiners of America, Local 1281*, 369 F. 2d 684 (C.A. 9), en-

¹¹ *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667; *N.L.R.B. v. International Union of Operating Engineers Local 12*, 323 F. 2d 545 (C.A. 9).

forcing 152 NLRB 629; *N.L.R.B. v. International Brotherhood of Electrical Workers, Local Union 340*, 301 F. 2d 824, 825 (C.A. 9); *N.L.R.B. v. I.A.M. District Lodge 727*, 279 F. 2d 761, 765-766 (C.A. 9), cert. denied, 364 U.S. 890; *N.L.R.B. v. Reed*, 206 F. 2d 184, 189 (C.A. 9). As we show below, Murdock's conduct had such an unlawful object.

As shown in the Statement, Desert was ready to comply with the Union's demand that it honor its agreement and lay off two of the five nonmembers of the Local whom it had brought into the area and proposed to keep those with greatest seniority—Dalton, Lopez and Gonzales. A reduction of the crew to three key men was all that Local 300 was lawfully entitled to ask, however, but Murdock, the Union's assistant business manager, did more than demand compliance with the agreement. He had already called a walk-out. Now, under threat of keeping the job shut down, he maintained a demand, made first to Company President Smith, then to Chavez (assistant to Foreman Richardson), and finally to Richardson himself, that Desert, in making its choice of those to discharge, could "put on three men according to the agreement, except Murray and Dalton;" these two "had to go," and the job might resume only "as long as Dalton and Murray are not working" (*supra*, p. 6). To get the work going again, Desert yielded; it discharged both Murray and Dalton. Desert, if free to do so on a nondiscriminatory basis, would have selected Murray, but not Dalton, for separation. The record makes evident, however, as the Board

found (R. 14-15, 24), that the Union compelled the selection.¹² In addition, the Board properly found that Murdock caused them to be the ones discharged because of his animus against them; he deemed them "disrespectful, uncooperative and abusive" principally because they did not promptly quit work, "go over, sit down, and shut up" (R. 14-15, 24). It followed that their discharges, which necessarily served to coerce "compliance with union obligations or practices," with resultant encouragement of union membership, were not privileged under the Act but unlawfully discriminatory.

On these facts, it is no defense to the Union that Desert, if freely releasing two employees, would have discharged Murray. Granted that the unchallenged agreement required two key men to be terminated, that the employer wished to hold those with greatest seniority, and that Murray would not have quali-

¹² Although Murdock denied demanding that Desert discharge these two men, the Board and its Trial Examiner found otherwise, withholding credence from Murdock whenever other witnesses substantially contradicted his testimony. As the Trial Examiner explained (R. 12 n. 1), Murdock was evasive and failed to give responsive answers to relatively simple and direct questions (see, for example, Tr. 126, 135, 139-140, 165-166); in addition, he contradicted himself on material matters and appeared to be seeking to help the Union's cause without regard to truth (see, for example, Tr. 125-126, 138-140, 163, 165-166). As this Court has noted, "The matter of the credibility of the witnesses is a function of the trial examiner and the Board." *N.L.R.B. v. Gorlick*, 364 F. 2d 508 (C.A. 9); accord, *N.L.R.B. v. Local 776 IATSE (Film Editors)*, 303 F. 2d 513, 518 (C.A. 9); *N.L.R.B. v. IBEW, Local 340 (Walsh Construction Co.)*, 301 F. 2d 824, 827-828 (C.A. 9).

fied under such a standard, we submit as applicable here a principle which this Court has voiced repeatedly: "The existence of some justifiable ground for discharge is no defense if it is not the moving cause." *Wells, Incorporated v. N.L.R.B.*, 162 F. 2d 457, 460 (C.A. 9); *N.L.R.B. v. Lewis*, 246 F. 2d 886, 890 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Company, Inc.*, 232 F. 2d 447, 450 (C.A. 9); *Boeing Airplane Co. v. N.L.R.B.*, 217 F. 2d 369, 374 (C.A. 9). Since the lawful basis *cannot* explain the discharge of Dalton, who had sufficient seniority to be retained, the Board was clearly warranted in concluding that Murray was also selected for unlawful reasons. The Board required (*infra*, p. 18), however, that in determining the amount of backpay, the fact that Murray would have been released under nondiscriminatory reduction-in-force standards should be considered, thus precluding any prejudice to the Local.

II. The Board Properly Determined the Amounts of Backpay Due Dalton and Murray

A. *The Union caused both employees to suffer wage losses for which it should make them whole*

Local 300 unlawfully caused Desert to lay off Dalton while steadily at work on a project which he rejoined the following week, and the amount of his loss in wages and fringe benefits could be determined on the conventional basis of the number of hours of work the Union made him lose. *N.L.R.B. v. Ellis and Watts Products, Inc.*, 344 F. 2d 67, 68 (C.A. 6). The Local also unlawfully caused Murray's dis-

charge on April 5, 1963, but he suffered no cognizable pay loss at that time since, in any event, lack of seniority would have properly led to his selection. The Union did cause cognizable pay losses after April 11, when Murray, now a member of Local 300, sought return to his regular job by presenting a written request from Desert's superintendent for his preferential dispatch, but the Local refused him clearance. Thereafter, Murray registered and reported weekly at the union hall without result and later returned to work with Desert without clearance, until the Union again wrongfully kept him from working. Its business agent, "Jitterbug" Jackson, came to the jobsite for the express purpose of making his foreman lay him off and forced him from the job by threat of a walkout (*supra*, pp. 10-11). During the next 8½ months Murray found work elsewhere before returning to regular work with Desert.

The impropriety of the Union's withholding the requested job clearance from Murray is readily demonstrable. Under the master agreement (*supra*, p. 9) providing for the Local's hiring hall, Murray was entitled to preference as an applicant "whom a Contractor requests by name who [had] been laid off [by the requesting contractor] within 270 days before [the] request." The Union contends, however, that although the contract speaks of work "within 270 calendar days" of the request, the parties to the master agreement have long understood and applied the foregoing contractual provision so that workers should receive preferential dispatch only when they

had *worked* "270 calendar days" within the area served and with the specific contractor who had laid them off and currently sought their dispatch. A number of factors support the Board's rejection of this contention, which it found to be no more than an afterthought.

Thus, when Murray asked for a preferential dispatch, Ray Waters, the Union's business manager, told him only that he had to get a written request from Desert's superintendent; he mentioned no additional condition (R. 46-47, 68; Tr. 288, 327). Nor did Waters say anything about Murray's work record with Desert when, upon Murray's due presentation of the required written request from Superintendent Roberts, he refused to grant clearance (R. 47, 68; Tr. 288, 324). Also, as the Board found (R. 47, 68), the relevant contract provision:

simply will not . . . bear the construction which respondent Union's counsel presently propounds. Clearly, Group A preference in dispatch must be granted applicants who have been laid off or terminated *within 270 Calendar days* before the contractor responsible for their layoff or termination proffers a written request for their referral. Counsel's argument that contractual dispatch, rather, may be granted only workers *laid off or terminated following 270 calendar days spent working* for such a contractor—makes no sense. [Emphasis in original.]

For as the Board observed (R. 47), employees do not ordinarily work every calendar day and a provision which referred to "270 calendar days spent

working” would be surprisingly inappropriate in such a context—that is, it could be interpreted literally to require work on holidays, or loosely to read “working days” for “calendar days,” creating a problem as to what limitations, if any, existed as to the time in which such work had to be performed. The Union failed, however, to state which possible construction it claimed was proper, or to provide any standard to resolve the inescapable ambiguity resulting from its contention. The Trial Examiner offered to reopen the record, if necessary, to receive documentation which Union counsel claimed would show such an interpretation of the clause either by arbitrators or the Joint Board of the Building Trades. Union counsel promised to append copies of such decisions to his brief, but the promise was not made good (R. 47; Tr. 374-375). Actually, as the Board noted, the contractual provision is an obvious restatement of an earlier provision in hiring-hall contracts to which Local 300 was a party and which, consonant with the Board’s interpretation here, provided that employees first to be referred should be those “recently laid off” by contractors in the area who “now desire to reemploy the same workmen,” regardless of their work history. *Petersen Construction Corp.*, 128 NLRB 969, 992 (1960), enf’d 336 F. 2d 459 (C.A. 9); *Mason Contractors Exchange of Southern California*, 132 NLRB 839, 841 (1961).¹³

¹³ A contractual provision identical with the one in the case at bar was involved in *Hod Carriers’ Building etc., Union, Local 652 (Earl C. Worley)* (1964), 147 NLRB 380, 384-

B. The Board used a proper formula in fixing the amount of Murray's wage losses

In its "wide discretion" to effect "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," (*Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194, 199), the Board resorted to a formula in which it took as the measure of Murray's quarterly gross earnings during the backpay period, the number of hours worked by Gonzales, his fellow laborer on the Rexford Drive project, except for the third quarter of 1963 during which Gonzales did not work full time. As to that quarter, the Board used the hours of Lopez, another laborer on that project. In using this basis for its computation, the Board reasonably gave weight to the fact that the five men on the crew received the same benefits, held routinely interchangeable classifications, worked comparable hours and performed similar tasks. Although Murray was classified as a laborer while the other two were rated pneumatic tool operators at the time of the April 5 layoff, this was only true of the particu-

385, enf'd 351 F. 2d 151 (C.A. 9). There, the business representative of a sister local of the Union told both an employee who had worked no more than 146 days for his current employer, and the employer himself, that if the employee signed the out-of-work list at the union hall and the employer wished his services, the employer could request the employee by name and the sister local forthwith would give him clearance. The business agent, in construing the contractual provision, did not depart from its plain language or import any length of work history such as that for which Local 300 now contends.

lar job; Murray had worked for Desert in the other classification also (*supra*, p. 14).

The Board's approach was "as close approximation as the circumstances permit[ted]." *Marlin-Rockwell Corp. v. N.L.R.B.*, 133 F. 2d 258, 260 (C.A. 2). Compare *N.L.R.B. v. Kartarik, Inc.*, 227 F. 2d 190, 191 (C.A. 8) ("the same amounts of wages as respondent had paid to other comparable employees during the period involved"); *N.L.R.B. v. Int'l Assn. of Heat & Frost Insulators*, 261 F. 2d 347, 350 (C.A. 1) ("the standard of what union journeymen had earned"). Accordingly, the Board's approach has a reasonable basis and is entitled to judicial affirmance. As the Eighth Circuit pointed out in *N.L.R.B. v. Brown & Root*, 311 F. 2d 447, 453, "Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances, the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations. . . . [W]ith respect to the formula for arriving at backpay rates or amounts which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected can not be declared to be arbitrary or unreasonable in the circumstances involved." Accord: *N.L.R.B. v. Local 138, Operating Engineers*, — F. 2d — (C.A. 2, No. 319, June 29, 1967, 65 LRRM 2938). Cf. *N.L.R.B. v. Deena Artware, Inc.*,

228 F. 2d 871, 872 (C.A. 6).¹⁴ Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a reasoned conclusion. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561." *N.L.R.B. v. Kartarik, Inc.*, 227 F. 2d 190, 193 (C.A. 8). Accord: *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562.

C. The Board properly overruled the Union's defenses

Before the Board, the Union contended that it was improper to hold backpay proceedings before entry of a judicial decree confirming its findings of statutory violation and enforcing its initial remedial order. While the Board has often followed that course (*Nathanson v. N.L.R.B.*, 344 U.S. 25, 29), there is no statutory requirement that the Board must defer backpay proceedings until a court has enforced the basic remedial order. The Act in no way purports to specify the proceedings which the Board shall institute so as to determine amounts of backpay due under its remedial orders. Section 10(c), the only portion of the Act making specific mention of backpay, provides, in relevant part, only that the Board, if finding that an unfair labor practice has been committed, shall state its findings of fact and order the repondent to cease and desist from the unfair labor practice found:

¹⁴ The Board's resulting order may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216.

and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: . . .

Not only does the Act omit to prescribe the Board's procedure in regard to backpay, but by Section 10 (d), it goes a step further and affirmatively authorizes the Board:

Until a transcript of the record in a case shall have been filed in a court, . . . *in such manner as it may deem proper [to] modify . . .*, in whole or in part, any . . . order made or issued by it.

In addition, Section 6 accords the Board "authority . . . to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," and the Board, by Section 102.52 of its Rules and Regulations, Series 8, as amended, permits a regional director, in his discretion, to initiate backpay proceedings "After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order," Thus, in instituting the backpay proceeding prior to enforcement of its earlier order, the Board acted in full accord with its statutory authority. It used its "wide discretion to keep the present matter within reasonable bounds through flexible procedural devices." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 199. Significantly, the Union neither cited judicial authority for its position, nor indicated how it was prejudiced by the Board's procedure.

Contrary to the Union's contention, the General Counsel was under no duty to allege, or prove as a

condition precedent to a backpay determination, that Dalton and Murray duly sought to mitigate their pay losses by registration and other efforts to find work. Rather, this is a matter which was part of the Union's affirmative defense. The Union had caused an employer to discriminate against employees and thereby came under a requirement to remedy its unfair labor practice. It was in much the same position as a conventional tortfeasor: Damage by its wrongful action having been shown, the burden to allege and show facts in diminution rests on the wrongdoer, including such matters as due search for work. The rule is unquestioned. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-200; *N.L.R.B. v. J. G. Boswell Co.*, 136 F. 2d 585, 595 (C.A. 9); *Fisher Construction Co. v. Lerche*, 232 F. 2d 508, 509 (C.A. 9); *Lozano Enterprises*, 152 N.L.R.B. 258, 262, enf'd. 356 F. 2d 483 (C.A. 9).¹⁵ And see *Snow v. N.L.R.B.*, 308 F. 2d 687, 695 (C.A. 9). Actually, the Union makes no claim that either Murray or Dalton failed to use due diligence in finding work during the backpay period, and the contrary clearly appears.

Finally, the Union contended that the Board did not have jurisdiction over the unfair labor practice because Murray failed to exhaust his contract reme-

¹⁵ Accord: *N.L.R.B. v. Mastro Plastics Corp.*, 354 F. 2d 170, 175, 178-179 (C.A. 2), cert. denied, 384 U.S. 972; *N.L.R.B. v. Reed & Prince Mfg. Co.*, 130 F. 2d 765, 768 (C.A. 1) (on contempt); *Nabors v. N.L.R.B.*, 323 F. 2d 686, 690 (C.A. 5), cert. denied, 376 U.S. 911; *N.L.R.B. v. Ellis and Watts Products Co.*, 344 F. 2d 67, 69 (C.A. 6); *N.L.R.B. v. Brown & Root, Inc.*, 311 F. 2d 447, 454 (C.A. 8).

dies. The Local relies on Article V of the master agreement which provides that grievances shall be reported by the Union's job steward to its business agent for an initial effort by the business agent for adjustment of the dispute with the contractor (R. Exh. 2, pp. 615, *et seq.*). The Article further provides:

If the grievance or dispute is not satisfactorily adjusted by the business agent and the Contractor or his representative, either *party* may refer the matter of the Joint Adjustment Board, provided that the *Union* and the *Contractor*, or his *representative*, have met at least once in an effort to settle the grievance or dispute. [Emphasis supplied.]

Of course, as an exercise of discretion, the Board will defer to existing arbitration awards in appropriate cases. See *Hawkins v. N.L.R.B.*, 358 F. 2d 281, 284 (C.A. 7); *Ramsey v. N.L.R.B.*, 327 F. 2d 784, 787-788 (C.A. 7), cert. denied, 377 U.S. 1003; *Lodge 743, International Association of Machinists v. United Aircraft Corp.*, 337 F. 2d 5, 11 (C.A. 2). Murray was not a *party* to the contract, however, and his right to pursue a grievance against the Union to arbitration is questionable. See *Black-Clawson Co. v. I.A.M. Lodge 355*, 313 F. 2d 179, 183-184 (C.A. 2). Assuming, however, that such access was open, that Murray knew this, and that the Joint Adjustment Board, with its Union representation, was "such an impartial tribunal as would justify [the Board's] deference to it" (*Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 733 (C.A. D.C.)), it is well settled that

the mere existence of the unexercised right to arbitration concerning conduct which is both a breach of a contract and an unfair labor practice does not deprive the Board of jurisdiction, for in such case there is "violation of a duty not only prescribed by the contract but also imposed directly by the Act, disregard of which would constitute an unfair labor practice." *Square D Co. v. N.L.R.B.*, 332 F. 2d 360, 364 (C.A. 9). Accord: *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436-437; *N.L.R.B. v. C. & C. Plywood Co.*, 385 U.S. 421, 428. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270; *N.L.R.B. v. Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9), cert. denied, 324 U.S. 877.¹⁶

¹⁶ The Union's reliance on *Republic Steel Corp. v. Maddox*, 379 U.S. 650 is misplaced. *Maddox* dealt with the right of an employee to sue the employer directly under a collective-bargaining agreement subject to Sec. 301(a) of the Act. As noted above, the union, rather than the employee, is the signatory party to the contract. *Maddox* merely holds that, accordingly, "the employee must afford the union the opportunity to act on his behalf, . . . [since such] activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in continuing administration of the contract. . . ." Thus, *Maddox* is clearly inapplicable to an employee's right to bring unfair labor practice charges, a right conferred by the Act itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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August 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(f) of the Rules of Court
(Numerals refer to pages of the stenographic
transcript)

Original unfair labor practice hearing—July 29, 1963

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in evidence</u>
1-A - 1-H	7	7	7

RESPONDENT'S EXHIBITS

1	107	107	107
2	109	110	110

Backpay proceeding—July 27 and August 2, 1965

GENERAL COUNSEL'S EXHIBITS

1(a) - 1(h)	179	179	179
2	180	180	181
3(a) - 3(e)	200-201	202	203
4(a) - 4(b)	204-205	205	205
5	290	291	291

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 49 U.S.C., Sec. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * * *

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,

and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX C

Sec. 102.52 of the Rules and Regulations of the National Labor Relations Board, Series 8 as amended, effective March 15, 1962, provides in relevant part as follows:

Sec. 102.52 *Initiation of proceedings; issuance of backpay specification; issuance of notice of hearing without backpay specification.*—After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a backpay specification in the name of the Board. * * * *

No. 21 839 ✓

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

_____)
DONALD E. BARKER,)
)
<i>Appellant,</i>)
)
vs.)
)
GRACE LINE, a corporation,)
)
<i>Appellee.</i>)
_____)

APPELLANT'S OPENING BRIEF

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FILED

SEP 18 1967

M. B. LUCK, CLERK

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No. 21 839

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

DONALD E. BARKER,)
)
)
<i>Appellant,</i>)
)
vs.)
)
GRACE LINE, a corporation,)
)
<i>Appellee.</i>)
)

APPELLANT'S OPENING BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of dismissal on the pleadings and from a jury verdict. The action is one for personal injuries sustained by a merchant seaman while a member of the crew and in the service of an American Flag vessel. Jurisdiction of the Federal court exists by reason of the Jones Act (28 USC §1916 Article III of the Constitution of the United States). This court has jurisdiction of appeal herein pursuant to 28 USC §1291.

II

SPECIFICATION OF ERRORS RELIED UPON

The errors upon which appellant relies are as follows:

- 1) The trial court erred in granting appellee's motion for judgment of dismissal on the pleadings of the third cause of action and dismissing said cause of action.
- 2) The trial court erred in deleting portions of appellant's requested instructions numbered two, six and twenty-eight. In each of which the jury was not apprised of the legal effect of certain factual situations set forth in each of the instructions. And the trial court further erred in failing

to give appellant's requested instructions numbered seventeen and twenty-four.

III

THE FACTS

This is an action for personal injuries sustained May 22, 1965 while appellant, a purser and member of the crew of the American Flag vessel *Santa Flavia*, owned by the appellee was injured at the port of Manzanillo, Mexico. The vessel arrived at pilot station at 8:30 in the evening and was finished with engines (meaning fast to the berth) at 9:30. (R.T. 11) The vessel cleared with customs at 9:34 (R.T. 13) and about 10 o'clock of that night appellant, having been informed by another member of the crew that he had been given a good hair cut in town, determined to go ashore in order to get his hair cut (R.T. 14). It was dark (R.T. 15) and no instructions had been given as to any dangers attendant to the use of the pier, nor route to take (R.T. 16). Appellant descended the gangway and, as cargo was being worked, in order to stay clear of the boom he started down the dock between railway tracks (R.T. 18). As he walked down the pier appellant could see directly ahead of him an entrance way from the pier to the street (R.T. 19).

The pier was lighted by the ship's light and by lights on the warehouse (R.T. 19/20). Appellant fell when coming from an illuminated area to a dark area (R.T. 65). The master of the vessel describes the place where appellant fell as "very dark" (R.T. 128). Appellant fell in a hole which the master describes as two feet deep and two feet in diameter (R.T. 129/130). This hold is variously described by appellant as being 75 - 100 feet from the bow of the vessel and 150 feet from the bow of the vessel (R.T. 67).

Appellant testified that when a vessel pulls into port it is customary to post warnings of known hazards (R.T. 40), but in this particular case as purser he was not advised to post notice nor was he warned of the danger attendant to the use of this pier (R.T. 41). Appellant's testimony with respect to the custom of posting warnings relative to dangerous conditions ashore is corroborated by the testimony of Capt. Brown (R.T. 107) who has been a licensed mariner for some twenty years (R.T. 94).

By reason of the fall into the hole appellant sustained the injuries which give rise to the instant litigation.

THE PLEADINGS

Appellant's complaint sets forth five causes of action. The first of these is in negligence for failure to provide him with a safe and proper means of access to and egress from the vessel. The second cause of action charges appellee with negligence in failure to provide proper medical care for the injuries sustained by appellant. The third cause of action sounds in unseaworthiness for failure to provide appellant with safe and proper means of access to and egress from the vessel. The fourth cause of action asserts a claim for unseaworthiness due to failure to provide appellant with the necessary and proper medical care and attention. The fifth cause of action is for maintenance and cure.

This appeal concerns itself only with the first and third causes of action. The cause of action for maintenance and cure was withdrawn. The jury finding on special interrogatories (C.T. III) that appellee provided necessary and proper medical attention and did not err in failing to relieve appellant of his duties as purser, is not challenged.

PROCEEDINGS BELOW

Prior to trial appellee made a motion for judgment

of dismissal on the pleadings as to the third and fourth causes

of action and for summary judgment of dismissal as to the first cause of action (C.T. 38). The motion was denied as to the first and fourth cause of action but appellee's motion for judgment of dismissal on the pleadings as to the third cause of action was granted and said cause of action was dismissed (C.T. 99).

The case was tried as to the first, second and fourth causes of action by the court sitting with a jury and a verdict returned in favor of appellee (C.T. 110). The following special interrogatories were each answered in the negative:

COUNT I:

a. Was defendant Grace Line Inc. negligent in connection with the condition of the adjacent dock?

b. Was defendant Grace Line Inc. negligent in failing to warn plaintiff Donald Barker of the condition of the dock?

COUNT II:

a. Was defendant negligent in failing to provide necessary and proper medical care and attention?

b. Was defendant Grace Line Inc. negligent in its failure to relieve plaintiff from his purser's duties after injury?

COUNT IV:

a. Was defendant's vessel unseaworthy in failing to supply necessary and proper medical care and attention?

b. Was defendant's vessel unseaworthy for failure to relieve plaintiff from his duties?

Appellant made timely motion for new trial (C.T. 211)

which was denied, and notice of appeal (C.T. 213) was timely filed.

VI

ARGUMENT

The errors specified require a reversal of the judgments entered herein.

VII

SUMMARY OF ARGUMENT

The court erred in dismissing the third cause of action -- the one in which appellant seeks to recover on the basis of unseaworthiness for failure to provide him with safe and proper means of access to and egress from the vessel. The argument respecting this error may be summarized as follows:

- 1) The duty to provide a seaworthy vessel includes the duty to provide a safe place for the crew member to work.
- 2) A vessel may be rendered unseaworthy by reason

of dangerous conditions ashore which render the place in which the seaman works unsafe.

3) Failure to provide a safe method of access to and egress from the vessel will render it unseaworthy.

4) Appellant was on the business of the ship at the time of his injury and hence entitled to a seaworthy vessel.

Whether or not an unseaworthy condition existed by reason of the presence of the hole in which appellant fell was a question of fact to be determined by the jury. The jury might have found that the condition was not dangerous, that the lighting was adequate, that appellant was not pursuing a proper route or upon some other basis decided the case adversely to appellant. But these were factual determinations which appellant was entitled to have tried as factual issues and not to have determined summarily as a matter of law. The law is, of course, well settled that where there is any factual question a summary judgment should not be granted. For instance the court said in *Great Northern Railway Co. vs Commodity Credit Corp.* (D.C. Minn. 1958) 163 F. Supp. 447:

"A motion for summary judgment is an extreme remedy and it should be granted only in the absence of genuine material fact issue. The burden is upon the movant and all doubts must be resolved against the moving party."

And in *Circelli vs Braunsten*, (D.C. Del. 1958) 165 F. Supp. 168, 171:

"Summary judgment will not be granted unless plaintiff cannot recover under any conceivable set of facts which might be proved."

And in *Union Carbide Corp. vs Hicks Express Inc.*,

(D.C. Del. 1958) 162 F. Supp. 612, 613:

"A motion for summary judgment is granted reluctantly and only in very clear cases."

The thrust of appellant's second assignment of error is that the court, in deleting portions of instructions proposed by appellant and in failing to give others did not fully apprise the jury of the applicable law, to the appellant's detriment.

For these reasons it is urged that the judgment of dismissal as to the third cause of action be reversed and that the verdict rendered by the jury on the first cause of action be set aside and new trial ordered on this cause of action.

VIII

THE DOCTRINE OF SEAWORTHINESS

This court speaking through Denman, Ct. J., said almost thirty years ago:

"The seaman injury cases indicate a growing area of responsibility of the owner in expansion of the meaning of the word "seaworthiness"

historically corresponding with the changed conditions of seamen from the sailing vessel to the modern steamship. The latter, insofar as concerns the engine crew, is like a shore power house, plus a constantly shifting floor and walls and machinery, in the motion of the vessel. With these changed conditions we are no longer required to consider the sailor as an adventurous athlete assuming the risk of the rigging and yards as an expected and accepted incident of his employment. Applying the obligation of the ship of the very early cases to these modern conditions would be like saying that, because when lime juice and other antiscorbutics were unknown as preventives of scurvy, a vessel sent to sea without them was seaworthy, a vessel is now seaworthy if going on a long voyage without preventives of scurvy and a diet producing it."

The Diamond Cement (9th Cir. 1938) 95 F. 2d 738, 1938 AMC 757, 762.

The growing area of responsibility of the shipowner referred to by Judge Denman is a normal development from the origin of the doctrine of seaworthiness as enunciated in *The Osceola* (1903) 189 US 158, 23 S.Ct. 483. Too often lawyers are inclined to equate seaworthiness with staunchness of hull, appliances, gear and manning reasonably fit for the intended purpose. What Mr. Justice Brown said in *The Osceola* was somewhat different (189 US at 175, 23 S.Ct. at 487):

" . . . The law may be considered as settled upon the following propositions:

"1. . . .

"2. . . . That the vessel and her owner are, both by English and American law, liable

to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff vs Metcalf*, 107 NY 211."

It is significant to note that the court in *The Osceola* made a distinction between *unseaworthiness of the ship* and a failure to supply and keep in order the proper appliances appurtenant thereto. Thus it would appear that Mr. Justice Brown had in mind an obligation of the shipowner considerably broader than merely supplying a stout hull and proper appliances, gear and appurtenances. It is perhaps relevant to look to the cases relied upon by the court in *The Osceola* and other cases decided prior thereto to determine what the court had in mind.

Scarff vs Metcalf, (Court of Appeals, N.Y. 1887)

107 NY 211, 13 N.E. 796, was an action by a mate injured aboard a ship. So far as appears from the reported decision, no liability attached to the ship by reason of the injury itself. The mate was given treatment from the medicines available in the ship's medicine chest and no complaint appears by reason of the manner in which such treatment was rendered. When the vessel reached port, a shoreside doctor was consulted who advised that surgery was necessary and should be performed immediately. The master failed to put the mate ashore but kept him aboard the ship until the ship made its return voyage.

Then the mate was hospitalized and surgery performed. Because of the delay in surgery an amputation was necessary. The following appears at 13 NE 797:

" . . . When he (the seaman) falls sick or suffers injury, the owners owe to him the duty of rendering such care and medical aid as circumstances permit . . ."

" . . .

" . . . But when that duty is not performed, and the seaman suffers injury from the neglect, the ship in a proceeding *in rem* and the owners in a suit against them, are liable for the injuries suffered . . ."

While *The Osceola* is regarded as the landmark case in establishing liability on the part of the ship for failure to provide a seaworthy vessel, it is merely the culmination of over one hundred years of development of this legal basis of liability. The overture commences in 1789. The earliest case that counsel has been able to locate is *Dixon vs The Cyrus*, (D.C. PA. 1789) Federal Case 3930, 7 Fed. Cas. 755. This was an action by a seaman to recover wages for the voyage. At the commencement of the voyage, the vessel was not equipped with proper or sufficient rigging. The crew refused to sail and the ship was held up two days before she finally got underway. The vessel finally sailed and the crew made do with the original rigging. At the completion of the voyage, the vessel refused to pay the crew members their wages on the grounds that the

crew members had violated their contract and forfeited wages by their refusal to sail. The Court held that the law implies that the ship will, at the commencement of the voyage, furnish proper, necessary and customary requisites for the voyage -- i.e. *that she shall be seaworthy*. The Court found the vessel to be unseaworthy and hence, the refusal of the crew to sail was not a breach of their contract.

In the wake of *Dixon* are three significant cases. The first of these is *The Wanonah* (D.C. ME. 1875) Federal Case No. 17412, 29 Fed. Cas. 697. This was an action to recover three months' extra statutory wages provided for in cases where seamen became stranded when the vessel was sold in a foreign port. The statute specifically provided that no extra wages would be payable where the discharge was occasioned by reason of the vessel being wrecked, stranded or unfit for service. In *Wanonah*, the vessel was unseaworthy at the commencement of the voyage because of her age and lack of repair. She encountered a storm, sprang leaks, and put into the closest foreign port. There it was determined that the cost of rendering her seaworthy was disproportionate to her value and she was sold. The Court held that the duty to provide a seaworthy vessel was paramount. That although the general rule is that seamen are not entitled to wages where no freight is earned,

such rule is inapplicable for failure to earn freight is the fault of the master or owner.

The next case in the wake of *Dixon* is *The Heroe*, (D.C. Del. 1884) 21 F. 525. This was an action to recover for wages. The vessel put to sea but because of difficulty with the engines, she returned to port. Libelants left the vessel and sought to recover their full wages. The Court said at page 528:

"It is not denied that unseaworthiness releases a crew and they will become entitled to their full wages for the remainder of the voyage. . ."

The third significant case following *Dixon* is *The Noddeburn*, (D.C. Ore. 1886) 28 F. 855. That was an action by a British seaman against a British vessel for injuries sustained while on the high seas due to a fall resulting by reason of a defective rope in the rigging giving way. The Court held that he was entitled to recover against the vessel for his injuries on the basis of unseaworthiness.

Dixon and its progeny are not relied upon by the Court in its decision in *The Osceola*. However, in addition to *Scarff vs Metcalf*, (Supra.) the Supreme Court does refer to five cases which are of significance. They are as follows:

The Edith Godden, (D.C. S.D.N.Y. 1885) 23 F. 43.

In this case an injury was sustained when gear gave way while

lowering a boat to the deck of a ship. The Court found the cause to be a strain due to lowering so heavy a weight in a rolling sea. The following appears at page 45 of the Opinion:

" . . . The machinery must therefore be deemed itself insufficient for the use to which it was applied, under the particular circumstances where it was used. . . the owners must be held answerable for any insufficiency of the derrick for the use to which it was necessarily subjected under the more hazardous circumstances at Port Maria. Their legal duty, by the municipal law, was to exercise due care in providing machinery adequate and proper for the use to which it was to be applied and to maintain it in like condition. (Citation)"

Olson v. Flavel, (D.C. Ore. 1888) 34 F. 477. This was an action for personal injuries suffered by a mate who while engaged in wheeling coal in a barrow over a narrow plank, one end of which rested on the dock, the other end on the vessel, fell and suffered a fracture of his leg. The Court in holding the vessel owner liable does not clearly state the basis of liability but a fair interpretation would be that liability was imposed by failure to provide a safe place to work.

The A. Heaton, (Cir. Ct. D. Mass. 1890) 43 F. 592, where the Court said at page 594:

"The case is thus resolved into the question of law, whether a seaman, permanently injured in the performance of his duty on ship-board in consequence of the negligence of a

master in not keeping a rope in proper condition and repair, can maintain a libel in admiralty against the ship to recover damages for the injury beyond his wages to the end of the voyage and the expenses of his cure. . . ."

The question was answered in the affirmative.

The liability of the shipowner for failure to provide a reasonably safe place to work is recognized in *The Bark Cann*, 2 F. 241 (2nd Cir. 1880) where the Court said at page 245:

"I proceed, therefore, to the inquiry whether the owner of this ship . . . became charged with any duty to the Libelant in respect to the stowage of the dunnage and plank that caused the injury in question. It was so arranged, that from its nature, it was dangerous to all persons who might be in that part of the between decks . . . The danger arose not from any use of the thing, but from the thing itself.

"Such being the character of this structure in case the mast was not properly secured, if the Libelant was in the between decks of this ship in the exercise of a right to be there, the shipowner owed him a duty to see that dunnage and plank was properly secured, which duty was not properly performed.

"The Libelant had, therefore, a right to be where he was; and it follows that there was a duty on the part of the owner to protect its falling upon him of its own weight."

The Frank & Willie, (D.C. S.D.N.Y. 1891) 45 F. 494,

where the Court said at page 496:

" . . . But the case shows that the mate, after notice of the dangerous condition of the pile of lumber, which his own unskillfulness or negligence had brought about, and after complaint made at least an hour before the accident, refused to take the usual precautions to make the pile safe, and, in effect, required the Libelant to continue to work in this dangerous condition. This was a breach of a duty owed by the ship and owners to the seamen for which the ship and owners are liable. Employers are required to provide workmen with necessarily safe conditions for work, according to the nature of the business and to the customary provisions for the safety of life and limb. . ."

The Julia Fowler, (D.C. S.D.N.Y. 1892) 49 F. 277,

involved injuries to a seaman by reason of a fall from a mast where a defective rope broke. The Court held he was entitled to recover where the mate has been told of the defect.

A fair appraisal of what constitutes unseaworthiness in the light of the foregoing cases and as the law existed at the time of the pronouncement of the second proposition in *The Osceola* is that unseaworthiness consists of a failure to provide a seaman with a safe place in which to work.

*A vessel is rendered
unseaworthy by reason
of dangerous conditions
ashore which render the
place in which the seaman
works unsafe.*

The concept of seaworthiness is one of status rather than situs. The shipowner's duty to provide the maritime worker with a safe place in which to work springs from the maritime services being rendered rather than the place where they are rendered. This is epitomized by the Court in *De Salvo v. Cunard Steamship Co. Ltd.*, (U.S.D.C. S.D.N.Y. 1959) 171 F. Supp. 813. In *De Salvo* a baggage chute was improperly positioned on the dock alongside appellee's ship which resulted injury to a longshoreman working on the dock. The jury returned a verdict for appellant on the basis of unseaworthiness. Defendant made a motion for a new trial which was denied. In denying the motion the Court said (171 F. Supp. at 819):

"The 'recent rapid development of the law in the area of maritime torts' (*Palermo v. Luckenbach Steamship Company*, [2 Cir.] 1957 A.M.C. 1733, 246 F.2d 577, 599 reversed 355 U.S. 20, 1957 A.M.C. 2275) is strikingly illustrated by the expansion of the admiralty concept of 'unseaworthiness', a remedy that 'is judicially rather than legislatively created.' *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 1958 A.M.C. 1754.

"The more recent cases in the area of 'unseaworthiness' suggest strongly that the emphasis has shifted from *situs to status from geography to policy*. While the cases are suggestive of a 'common principles of decision or method of approach to the problem', there is no discernible 'simple formula' for reaching the correct conclusion (citation).

"The doctrine of unseaworthiness has been extended by the Supreme Court to cover certain

shore-based workers on the ground that, under certain circumstances, a longshoreman, stevedore or other harbor workers may be performing work traditionally done by seamen; and, consequently, if injured, may sue the shipowner (citation).

"Unseaworthiness recovery may be available even where, as here, the injury is not on shipboard but occurs when the longshoreman on the pier is engaged in loading or unloading the ship or performing similar services handling the ship's equipment (citations)." (Emphasis added)

In *Huff v. Matson Navigation Company*, 9th Cir. 1964)

338 F. 2d 205, 1964 A.M.C. 2219, this Court had before it the question of whether liability for unseaworthiness could be created by reason of defective shore-based equipment. This Court recognized that the function of the doctrine of unseaworthiness was to place the cost of injuries to those engaged in the ship's business upon the one best able to minimize the risk -- the shipowner. After reviewing cases applicable to the problem before it, this court said (1964 AMC 2227):

"And finally, in *Italia Soc. v. Ore. Stevedoring Co.*,¹ the Court held that the stevedoring company was liable over to the shipowner for the unseaworthiness of the ship created by the stevedoring company, even though no negligence on the part of the stevedoring company was shown. It was in that case that the Court used the language we have quoted above describing the shipowner's liability to longshoremen for

¹ 376 U.S. 315, 1964 AMC 1075.

unseaworthiness in the type of cases we have here been discussing. The Court there also expounded the rationale of this whole series of cases as follows: (376 U.S. p. 324, 1964 A.M.C. p. 1083) 'Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. ***[W]e deal here with***an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, *Reed v. Yaka*, 373 U.S. 410, 414, 1963 A.M.C. 1373, 1377, we think our decision today is in furtherance of these objective.' These objectives were stated in footnote 10, 376 U.S. page 323, 1964 A.M.C. page 1082, of that opinion, by quoting from *DeGioia v. United States Lines*, (2 Cir.), 1962 A.M.C. 1747, 1753, 304 F. (2d) 421, 426, as follows: 'The foundation of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.'

The significance of this Court's holding in *Huff*

is emphasized in *Spann v. Lauritzen*, (3rd Cir. 1965) 344 F.

2d 204, 1965 A.M.C. 1192. Here again the Court recognized

that the touchstone of liability was not whether the defective

condition was aboard the vessel, but rather whether the risk incurred fell within the hazard of the ship's service. *Spann* represents the other side of the *Huff* coin. In *Spann*, plaintiff, a longshoreman, was working ashore operating a shoreside hopper in which a shorebased crane dropped cargo which it had removed from the vessel. Plaintiff sustained injury through an alleged malfunction of the hopper. In holding that the warranty of seaworthiness was applicable the Court said (1965 A.M.C. 1197):

"It has long been held that the warranty of seaworthiness extends not only to the vessel itself in its hull, gear and stowage, but also to its appurtenant appliances and equipment. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 99, 1944 A.M.C. 1, 4 (1944); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213, 1963 A.M.C. 1649 (1963). Since the purpose of the doctrine is to protect those in the service of the vessel, the question whether a particular case falls within the scope of the warranty of seaworthiness is answered by determining *whether risk incurred falls within the hazard of the service*. As said in *Sieracki*: ¹[Liability for unseaworthiness] is essentially a species of liability without fault. *** Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *** It is a form of absolute duty owing to all within the range of its humanitarian policy.'

"On principle *** this policy is not confined to seamen who perform the ship's service

under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. (328 U.S. pp. 94-5, 1946 A.M.C. p. 704-5)

"Accordingly the Court has rejected the claim that the shipowner is not responsible for defects in equipment because it was owned and operated by the stevedore rather than by shipowner and was only temporarily aboard the vessel. *Alaska Steamship Co. v. Pettersen*, 347 U.S. 396, 1954 A.M.C. 860 (1954); *Rogers v. United States Lines*, 347 U.S. 984, 1954 A.M.C. 1088 (1954). In *Sieracki*, *Pettersen* and *Rogers* the injuries were sustained aboard the vessel by equipment connected to it. Recently in *Gutierrez* the Court expressly held 'that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier' (373 U.S. p. 215, 1963 A.M.C. p. 1656.)" (Emphasis added)

See also *Deffes v. Federal Barge Lines*, (5th Cir.

1966) 361 F. 2d 422, 1966 A.M.C. 1450.

In *Gutierrez v. Waterman Steamship Corp.*, (1963)

373 U.S. 206 1963 A.M.C. 1649, a longshoreman working on the docks sustained injury when he slipped upon beans which had fallen during the discharge of cargo from the vessel. The Court recognized one of the problems presented as "whether the shipowner's warranty of seaworthiness extends to longshoremen

on the pier who are unloading the ship's cargo" (1963 A.M.C. 1654). The Court answered the question in this manner (1963 A.M.C. at 1656):

"The second question is one of first impression in this Court, although other federal courts have already recognized that the case law compels this conclusion. *Strika v. Netherland Ministry of Traffic*, 1951 A.M.C. 84, 185 F. (2d) 555 (2 Cir., 1950); *Robillard v. A. L. Burbank & Co.*, 1962 A.M.C. 536, 186 F. Supp. 193 (S.D.N.Y., 1960); see *Pope & Talbot, Inc. v. Cordray*, 1959 A.M.C. 603, 258 F. (2d) 214, 218 (9 Cir.) In *Strika*, while the longshoreman was working on the dock, use of an improper wire cable caused a hatch cover to fall on him. Building on such cases as *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 1943 A.M.C. 149, where seamen recovered under the Jones Act for injuries due to the owner's negligence despite their being ashore at the time, and *Sieracki, supra*, where longshoremen aboard ship doing seamen's tasks were permitted to recover for unseaworthiness, the Court held that the tort of unseaworthiness arises out of a maritime status or relation and is therefore 'cognizable by the maritime [substantive] law whether it arises on sea or on land.' Accordingly, the court permitted recovery for unseaworthiness. See also *Hagons v. Farrell Lines*, 1956 A.M.C. 2133, 237 F. (2d) 477 (3 Cir.), where the point was assumed in the case involving a longshoreman on the pier struck with sacks of beans when a defective winch did not brake properly.

"In *Robillard, supra*, a longshoreman was injured when, because of unseaworthy stowage and overladen drafts, he was struck by some cargo that was knocked off the deck onto the pier. The court found 'the logic of these authorities *** [*Sieracki, Strika*, etc.] ineluctable' and allowed recovery in unseaworthiness while denying it in negligence."

*The failure to provide
a safe method of access
to and egress from the
vessel rendered it
unseaworthy.*

The shipowner's duty to provide a safe place to work specifically applies to means of getting to and from the vessel. The attention of the Court is directed to *Buch v. United States of America*, (U.S.D.C. S.D.N.Y. 1954) 122 F. Supp. 25, 1954 A.M.C. 1309, where the following appears (1954 A.M.C. at 1310-11):

"Libelant seeks to recover on both unseaworthiness and negligence. Respondent as owner of the *Bloomquist* was under an absolute and non-delegable duty to crew members to provide a seaworthy ship and safe and seaworthy appliances. It was required to afford libelant a safe means of ingress and egress from the vessel through its own equipment or that supplied by others upon whom it relied. The fact that the barges supplied the ladder when those of the *Bloomquist* were inaccessible and unavailable for use, did not relieve it of its absolute duty to provide a seaworthy vessel and appurtenant appliances and equipment.

"I find that the ladder supplied by the *Comptoir* the only one available for libelant's use, was not reasonably adequate to provide a safe means of egress from the ship to the barge; it was of insufficient length and its bottom rung was three to four feet above the deck of the *Comptoir*. Under the prevailing conditions it was not reasonably fit for the use for which it was intended and was an inadequate appliance and not much different from a totally defective one. The failure of the *Bloomquist* to supply or cause to be supplied

an adequate Jacobs ladder or other adequate appurtenance for leaving the ship rendered it unseaworthy."

See also *Pettersen v. United States*, (2 Cir. 1955) 324 F. 2d 212, 1955 A.M.C. 1455.

This obligation to provide a safe means of getting to and from the vessel extends beyond the duty to provide a safe ladder or a safe area at the foot of the gangway. It extends to the approaches of the vessel itself. In *Bradshaw v. Carol Ann*, (U.S.D.C. S.D. Tex. 1956) F. Supp. 1958 A.M.C. 1962, plaintiff, a seaman, in order to reach his vessel had to cross the decks of two other vessels moored alongside with the hazards of an open hatch and insufficient lighting. The court said (1958 A.M.C. 965-66):

"Libelant insists that the warranty of seaworthiness of a vessel, including as it does the duty to provide a safe place to work, extends to the mode of ingress and egress. The *Carol Ann* recognizes that this is so but says that mode of passage furnished here was reasonably safe for the purpose and that the obligation to furnish safe passage applies only to the vessel itself and appurtenances in the immediate area or vicinity and does not extend to an area over which the shipowner has no control, citing among other cases, *Paul v. United States*, (3 Cir.), 1953 A.M.C. 1000, 205 F. (2d) 38, where a seaman fell into a pit on the dock area about 100 feet from the vessel. That was an action for negligence under the Jones Act in which Chief Judge Biggs strongly dissented. It was decided before *Alaska Steamship Co. Inc. v. Petterson*, 347 U.S. 396, 1954 A.M.C. 860, affirming per curiam (9 Cir.) 1953 A.M.C. 1405, 205 F. (2d) 478, imposing strict liability upon

an unseaworthy vessel regardless of fault or control of the instrumentality causing the injury.

"Here the *Carol Ann* was not moored alongside the dock as was the *El Rancho*, and the injury did not occur on the dock. In order to get to the dock, or return, libellant had to cross over the decks of two vessels with the hazards of an open hatch and insufficient lighting at night. This arrangement between the ship-owners was the method chosen, and acquiesced in by the shipowners and the vessels themselves in providing safe passage to the dock and back to the vessel. Thus each 'out' vessel adopted the other for the purpose of safe passage. The 'out' vessel may not have had the power of control of the other vessel but, having adopted the *El Rancho* as part of its own means for safe passage, the *Carol Ann* became liable, irrespective of control or knowledge of the conditions on the *El Rancho*.

"While the *Carol Ann's* failure to inspect the means of passage could be said to be negligence, this does not mean that the vessel was unseaworthy (sic) since unseaworthiness can be created by negligence."

*Appellant was on the
business of the ship
at the time of the
accident.*

At the time of the injury with which we are concerned, appellant was proceeding down the pier for the purpose of getting a hair cut. It was as much on ship's business as though he were carrying ship's documents to a shoreside agent. This has been settled law for over twenty three years. In *Aguilar v. Standard Oil Company*, (1943) 318 U.S. 724, 87 L. Ed. 1107, 63 S. Ct. 930, 318 U.S. pp. 733-734, the Court said:

" . . . Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. . ."

"The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman incurs injury, it is because of the voyage, *the ship-owner's business*. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. *In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of employment.*" (Emphasis added)

Although *Aguilar* was a maintenance and cure case its teachings are equally applicable to a cause of action based on unseaworthiness.

In *Marceau v. Great Lakes Transit Co.*, (2 Cir. 1945) 146 F. 2d 416, 1945 A.M.C. 223, a cook and member of the crew who had gone ashore for personal business or recreation was injured while returning to the vessel when he slipped upon foreign matter on the dock. Defendant contended that the court was without jurisdiction because: (1) Plaintiff had sought and received compensation under the New York Workmen's Compensation Act, (2) that plaintiff was not injured in the course and scope

of his employment and (3) that Jones Act did not extend to accident on the dock. After disposing of the first contention the Court said (1945 A.M.C. 225):

"The defendant's other two contentions are likewise without merit. The plaintiff was acting under orders when he returned to the ship. Consequently at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee over which the plaintiff had to pass in order to return to his work. Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property if approaching by a customary route. *Wong Bar v. Suburban Petroleum Transport*, 1941 A.M.C. 844, 119 F. (2d) 745 (2CCA). In *Erie R. R. Co. v. Winfield*, 244 US 170, the Supreme Court held that a railroad employee was engaged in interstate commerce and could recover for injuries sustained through the negligence of the railroad when incurred while leaving his work for the day and passing through the freight yard of the railroad. See to the same effect: *Virginia Ry. Co. v. Early*, 130 F. (2d) 548 (4CCA); *Young v. New York N. H. & H. R. R. Co.*, 74 F. (2d) 251, at p. 252 (2CCA); *Atlantic Coast Line Ry. Co., v. Williams*, 284 Fed. 262 (5CCA). In *Cudahy Co. v. Parramore*, 263 U.S. 418, 426, the Supreme Court allowed an employee to recover workman's compensation for injuries suffered as in the course of his employment when he necessarily was going to his employer's factory and was killed by a locomotive on a railroad adjacent to the plant. See also *Bountiful Brick Co. v. Giles*, 275 U.S. 154, 158. The recent decision of the Supreme Court in *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 1943 A.M.C. 149, extends the protection of the Jones Act to seamen who are injured through the negligence of their employers while

acting in the course of their employment even though the injuries occur on land. Chief Justice Stone, writing for the Court, said: 'The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.'

The language of the Supreme Court in *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 80 S. Ct. 247, is dispositive of this question. The Court said at page 132-133:

"The fact that the injury did not occur on the vessel is not controlling, as *Senko v. LaCrosse Dredging Corp.*, *supra*, 352 U.S. 373, 77 S. Ct. 417, holds. As 'seaman' may be sent off ship to perform duties of his employment. *O'Donnell v. Great Lakes Transit Corp.*, 2 Cir., 146 F. 2d 416, a ship's cook was allowed to recover under the Jones Act when, pursuant to duty, he was returning to the ship and was injured on the dock while approaching a ladder used as ingress to the vessel.

"We held that a seaman who was injured on the dock while departing from the ship on shore leave was in the service of the vessel and was entitled to recover for maintenance and cure in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107. It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea. *Id.* 318 U.S. at pages 736-737, 63 S. Ct. at pages 936-937. We also held that a seaman injured in a dance hall while on shore leave was in the service of his ship in *Warren v. United States*, 340 U.S. 523, 529, 71 S. Ct. 432, 436, 95 L. Ed. 503. These two cases were not

brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases. See Gilmore and Black, *The Law of Admiralty*, p. 284, and see *O'Donnell v. Great Lakes Co.*, *supra*, 318 U.S. at page 43, 63 S. Ct. at page 492; *Marceau v. Great Lakes Transit Corp.* *supra*."

IX

ERRORS OF INSTRUCTION EXCEPTED TO
REQUIRE THE REVERSAL OF THE JUDGMENT BELOW

After the jury had been instructed, counsel for appellant in the absence of the jury excepted to certain of the instructions as given and certain of the instructions given as modified. Upon reflection it is not our desire to press all of these exceptions by this appeal. However, certain of them are, we believe, of such magnitude as require the reversal of the judgment below. These exceptions are noted in reporter's transcript pp. 257-258.

A. The exception to the giving of appellant's proposed instruction number two, as modified was well taken.

The instruction as proposed read as follows, the italicized portions representing the matters stricken by the Court (C.T. 124-125):

"Plaintiff is an American merchant seaman and has brought this action to recover damages from his employer, a shipowner, for personal injuries plaintiff claims to have suffered as a result of the negligence of the employer and the unseaworthiness of its vessel the *S/S Santa Flavia*.

"Plaintiff has set forth his case in three separate and distinct claims or causes of action.

"First, plaintiff claims that the shipowner was negligent under the Jones Act in failing to furnish him with safe and proper means of passage along the dock near which the vessel was moored when he took shore leave. Plaintiff claims a duty was imposed upon the employer to provide safe passage on the dock, and that the employer failed to fulfill its duty in this respect. Plaintiff claims that the shipowner either knew, or by the exercise of reasonable care, should have known of the unsafe condition on the dock, and taken steps to warn him or otherwise protect his safety.

"If you should find from the facts of the case and based upon a preponderance of the evidence, and applying the law set forth in these instructions, that such a duty of care was imposed upon the shipowner, but that it failed to discharge its duty, and thereby injury was caused to plaintiff, then a verdict in plaintiff's favor is warranted.

"Second, plaintiff claims that after he was injured, the shipowner was negligent under the Jones Act in failing to provide him with necessary and proper medical care and

attention and required him to continue working instead of relieving him from duty, thereby causing him additional personal injury.

"If you should find such claims supported by a preponderance of the evidence in the case and justified by the law set forth in these instructions, then a verdict in plaintiff's favor on this cause of action is warranted.

"Third, plaintiff claims that the vessel was unseaworthy in not furnishing him with necessary and proper medical care and attention and in requiring him to continue working instead of relieving him from duty, after he was injured, thereby causing him additional personal injury.

"While this claim on a factual basis is similar to plaintiff's second cause of action, it is different in legal theory. Therefore, if you find that plaintiff's factual contentions are supported by a preponderance of the evidence and that the applicable law relating to absolute liability of a shipowner for unseaworthiness, set forth in these instructions, warrants such a result, a verdict in plaintiff's favor would be proper.

"While plaintiff has set forth three separate and distinct claims, he is claiming and is entitled to only a single monetary recovery and that is true whether such recovery is required or supported by any one or more of the theories plaintiff has advanced."

Jones Act (Act. of June 5, 1920, c. 250 sec. 33, 41 Stat. 1007) Liability of shipowner employer under the Jones Act for injury because of unsafe condition of dock.

O'Donnell v. Great Lakes Dredge & Dock Co.,
(1943) 318 U.S. 36, 87 L. Ed. 596, 63 S. Ct.
488, 1943 A.M.C. 150.

Aguilar v. Standard Oil Co., (1943) 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107, 1943 A.M.C. 4.

Braen v. Pfeiffer Transp. Co., (1959) 361 U.S. 129, 80 S. Ct. 247, 1960 A.M.C. 2.

Hopson v. Texaco Inc., (1966) 383 U.S. 262, 15 L. Ed. 2d 740, 86 S. Ct. 765, 1966 A.M.C. 281.

Marceau v. Great Lakes Transit Co., (2 Cir. 1945) 146 F. 2d, 416, 1945 A.M.C. 223 cert. den. 324 U.S. 872.

Liability of shipowner employer for negligent failure (under the Jones Act) to furnish necessary and proper medical care and attention:

Cortes v. Baltimore Insular Lines, (1932) 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368, 1933 A.M.C. 9.

DeZon v. American President Lines, (1942) 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, 1943 A.M.C. 483.

Nordyke v. Van Camp Sea Food Co., (9 Cir. 1944) 140 F. 2d 902, 1944 A.M.C. cert. den. 322 U.S. 760.

Liability of shipowner employer under the unseaworthiness doctrine for failure to provide proper medical care and attention:

The IROQUOIS, (1904) 194 U.S. 240, 24 S. Ct. 640, 48 L. Ed. 955.

Cortes v. Baltimore Insular Lines, *supra*.

Boudoin v. Likes Bros. Steamship Co., (1955) 348 U.S. 336, 99 L. Ed. 354, 75 S. Ct. 382, 1955 A.M.C. 488.

Gutierrez v. Waterman Steamship Co., (1963) 373 U.S. 206, 10 L. Ed. 2d 297, 83 S. Ct. 1185, 1963 A.M.C. 1649.

Mitchell v. Trawler Racer Inc., (1960) 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, 1960 A.M.C. 1503.

See generally, Gilmore & Black, "The Law of Admiralty" (Foundation Press, Brooklyn, 1957) pp. 308-332. The authors discuss negligence and unseaworthiness as related to seamen's personal injury actions, and the merging character of the doctrines.

A seaman may state his case on as many and diverse theories as he can muster and may recover on a factual showing which supports any one of them:

Fitzgerald v. United States Lines, (1963) 373 U.S. 16, 10 L. Ed. 2d 720, 83 S. Ct. 1646, 1963 A.M.C. 1093.

McCarthy v. American Eastern Corp. (1949) 175 F. 2d 724.

Belado v. Likes Bros. Steamship Co., (2 Cir. 1950) 169 F. 2d 943, 1950 A.M.C. 609.

Williams v. Tide Water Associated Oil Co., (Cir.9 1955) 227 F. 2d 791, 1956, A.M.C. 136.

The instructions as given by the court merely set forth appellant's contentions. The charge totally failed in the portion which was of significance, i.e., the legal result which must flow if such contention were proved.

It is hornbook law that every party, upon request, is entitled to instructions of every theory of the case having substantial support in the evidence. *Sills v. Los Angeles Transit Line*, (S.Ct. Calif. 1953) 40 Cal. 2d 630, 255 P. 2d 795;

Daniels v. City and County of San Francisco, (S. Ct. Calif.

1953) 40 Cal. 2d 614, 255 P. 2d 785.

*The exception to appellant's
instruction number six as
given was well taken.*

Appellant's Instruction No. six reads as follows,
the italicized portion being stricken by the court (C.T. 134):

"The defendant shipowner was acting
by and through the master of the vessel in
this case. The shipowner entrusted the manage-
ment, operations and control of the vessel to
the master and his acts, or failure to act,
are considered in law to be the acts, or failure
to act, of the defendant itself.

*"Therefore, if you should find from
a preponderance of the evidence in this case
that the master was in any way negligent in
the management or operation of the ship, or
in failure to provide safe and proper passage
on the dock where the vessel was berthed, or
in failing to provide plaintiff with necessary
and proper medical care and attention, and that
such negligence, in whole or in part, caused
plaintiff's accident, or worsened his physical
condition, the defendant is personally liable
therefore, and a verdict against the defendant
would be justified in such circumstances."*

Mahnich v. Southern Steamship Co.
(1955) 321 U.S. 96, 64 S. Ct. 455,
88 L. Ed. 561, 144 A.M.C. 1.

This is subject to the same exception as the
preceding instruction complained of as modified. The
court has failed to apprise the jury of the legal con-
sequences which flow from the dereliction of the master
of the vessel.

The exception to appellant's instruction number twenty-eight as given was well taken.

The instruction as proposed read as follows (the italicized portion being stricken by the court) C.T. 129:

"If the defendant shipowner in this case was negligent, and its negligence was a proximate cause of the accident to plaintiff, the shipowner is liable in damages even though the owner's negligence was not the sole proximate cause of the injury, and even though the negligence of some third person, neither the injured plaintiff or the shipowner, and in this case, the Mexican government, contributed in equal, greater or lesser degree, in causing the injury.

"Thus, if the shipowner was negligent and such negligence was a cause of the accident to plaintiff, even though there may have been negligence of a third person such as the Mexican government which also was a cause of the accident, the defendant would still be fully liable."

BAJI 301-F (adapted)

Scott v. Isbrandsten Co., (4 Cir. 1964) 327 F. 2d 113, 1964 A.M.C. 1126 ("***The jury could consider not only the ship's unseaworthiness and Isbrandsten's negligence in arriving at a determination of proximate cause, but also any *concurrent* negligence on the part of the long-shoremen, which proximately caused or proximately contributed to the accident. 1964 A.M.C. p. 1138.)

This modification is subject to the same objection previously made that the court failed to apprise the jury of the legal affect of the negligence of the shipowner in the event that the Mexican government was also negligent.

The refusal of the court to give appellant's proposed instructions numbered twenty-four and seventeen require a reversal in this case.

The case presented to the jury involved a field of law with which we would not reasonably expect them to be familiar. As Judge Hale observed in *Sullivan v. Lyons Steamship Ltd.*, (S. Ct. Wash. 1963) 387 P. 2d 776-77:

"The sea is a strange and wonderous thing, and equally so is the law it inspires..."

Peculiar to the law of the sea is the fact that a shipowner owes a higher degree of care to seamen than does a shoreside employer of labor. The jurors oriented as they are by experience and perhaps from instruction in other cases, absent intelligence from the court would naturally hold defendant in this case only to a duty to exercise ordinary care. Appellant's proposed instruction number 24 (C.T. 183-84) correctly sets forth the law. This instruction reads:

"A higher degree of care is required of employers of seamen with regard to providing them with a safe and proper place in and about which to work, with safe and proper working conditions, with safe, proper and sufficient appliances, gear, equipment, and tackle, and with competent, careful and sufficient officers, fellow workers and supervision, than is required of employers of workers on land engaged in comparable duties.

"The reason for this rule is that work on board or in connection with ships is more hazardous and dangerous, generally speaking, than similar work ashore.

Armit v. Loveland, (3 Cir. 1940) 115 F. 2d 308, 1940 A.M.C. 1429 ("The same peculiar circumstances attending the employment alike require that the rules of the commonlaw respecting proof of negligence of the employer be not visited too rigorously upon seamen. Stated conversely, *a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore.*")

The STATE OF MARYLAND, (4 Cir. 1936) 85 F. 2d 944, A.M.C. ("In requiring that seamen on a voyage who became ill or were injured in the service of the vessel should be supported and cared for and paid their wages until recovery, the maritime law provided for them *a more humane and effective remedy than was afforded by the common law to the employees on land.* *** With the advent of steam navigation * * vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the operation of which required the use of many and varied appliances and a high degree of technical knowledge. * * *The duty of the vessel and her owners to the seaman, in this new age of navigation extended beyond mere maintenance and cure;* * * the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and that *for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof.*")

The H. A. SCANDRET, (2 Cir. 1937) 87 F. 2d 708, 1937 A.M.C. 326. ("A ship is an instrumentality full of *internal hazards* aggravated, if not created, by the uses to which she is put. It seems to us that everything is to be said for

holding her absolutely liable to her crew for injuries arising from defects in her hull or equipment. The liability can be covered by insurance and is *better treated as an expense of the business than one left to an uncertain determination of courts in actions to recover for negligence.* Circuit Judge Augustus N. Hand.")

Krey v. United States, (2 Cir. 1941) 123 F. 2d 1008, 1942 A.M.C. 19. (" * * The existence of such unseaworthy conditions may very well be found under circumstances which might not be considered unsafe on land because of the increased risks in the circumstances and of the traditional protection accorded seamen as wards of the admiralty.")

Storgard v. France & Canada Steamship Corp., (2 Cir.) 263 F. 545.

Braen v. Pfeifer Oil Transp. Co., (1959) 361 U.S. 129, 1960 A.M.C. 2. (" * * The scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships.") (1960 A.M.C. p. 5.)

Appellant's instruction number seventeen (C.T. 177-78)

reads as follows:

"In determining the question of ship-owner negligence under the Jones Act, you may consider all the factors and circumstances in the case as follows: the frequency with which and over what period of time the ship in this case or the company's ships generally called at the port or dock in question; the fact that it was a foreign port; the factor of whether the shipowner or its master knew or by the exercise of reasonable care should have known of any unsafe condition on the dock; the factor of the ship's knowledge that crew members would take shore leave and use the passageway in

question; the matter of whether the shipowner or master had the opportunity to warn the crew of unsafe conditions on the dock and to furnish them with safeguards, such as flashlights but failed to do so; the question of whether the shipowner requested or could have requested the Mexican government to repair or guard against any unsafe condition on the dock, and whether the Mexican government would have heeded such a request; the factor of how frequently and over what period of time the master of the *S/S SANTA FLAVIA* had been at the port, and over the dock in question; the factor of whether the vessel's agents knew or should have known of any unsafe condition of the dock and should have warned the ship and its crew concerning the condition, or taken steps through the Mexican government to have the situation corrected; these, and any other factors which would be relevant can be considered by you in deciding whether there was "operational negligence" on the part of the shipowner in the context of this case which would indicate it had failed to discharge its "duty of care" to the ship's crew.

Crumady v. The JOACHIM HENDRIK FISSER, (1959)
358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445,
1959 A.M.C. 580.

Blassingill v. Waterman Steamship Corp., (9
Cir. 1964) 336 F. 2d 367, 1964 A.M.C. 1932.

Thompson v. Calmar S.S. Corp., (3 Cir. 1964)
331 F. 2d 657, 1964 A.M.C. 2249.

Scott v. Isbrandtsen Co., (4 Cir. 1964) 327
F. 2d 113, 1964 A.M.C. 1126.

We are satisfied that the instant case is one involving operational negligence. The positioning of the ship, the lighting afforded and the hole existing in the dock all combine to create a dangerous condition. The cases dealing

with "operational negligence" primarily are cases which hold the vessel unseaworthy because of "operational negligence", however, as Gilmore and Black observed in their work, "The Law of Admiralty", page 230:

"...Experience shows that whatever is accepted as 'unseaworthy' sooner or later becomes 'negligence' and vice versa."

Briefly, the doctrine of operational negligence is that where a proper undertaking or proper equipment is improperly employed so as to create a dangerous condition, "operational negligence" results. We find "operational negligence" cases -- though not necessarily so designated -- as early as 45 years ago. In *Carlisle Packing Co. v. Sandanger*, (1922) 259, U.S. 255, the vessel left the dock without adequate life preservers and with a can containing gasoline but marked "coal oil". Plaintiff used the contents of the can to start a wood fire. An explosion resulted. Because of the absence of life preservers, he delayed jumping in the water to put out the flames which enveloped his body thus making his injuries from burns more severe. The Supreme Court held that the trial court should have instructed the jury that the absence of life preservers and mislabeling of the can made the vessel unseaworthy. No matter how you analyze the case it is one of operational negligence.

In *Mahnich v. Southern Steamship Co.*, (1944) 321

U.S. 96, an unsound rope was selected to rig a staging when sound rope was available. The shipowner contended that the vessel was not unseaworthy because of the availability of sound rope and the accident was due solely to the mate's negligence. The Supreme Court held since due diligence did not relieve a ship from its duty to furnish adequate appliances, the operational negligence in supplying the unsound rope did not excuse the ship for the unseaworthy condition.

Based upon the foregoing, we have the expansion of the doctrine in *Crumady*, *Blassingill*, *Thompson* and *Scott (supra)* as authority for the proposed instruction.

As we have heretofore pointed out, appellant was entitled to have the jury instructed as to every theory of his case which might find support in the evidence. (*Montgomery v. Virginia Stage Lines*, [CADC, 1951] 191 F. 2d 770.)

We respectfully submit that the failure to give requested instructions seventeen and twenty-four requires a reversal of the judgment on the first cause of action.

X

CONCLUSION

It is submitted that the court below erred in granting the motion for judgment of dismissal of the pleadings of the third cause of action based upon unseaworthiness. Under the applicable law, the determination of whether or not the vessel was unseaworthy by reason of the conditions existing on the dock, was a question of fact to be determined by the jury in the light of all the evidence. In the existing state of the law, it was clearly erroneous to determine as a matter of law that no cause of action was stated.

The errors of instruction complained of necessitate reversal of the judgment entered on the first cause of action based on negligence. The court by deleting portions of instructions submitted by Appellant failed to apprise the jury of the law which applied to the facts adduced in evidence. By failing to give Appellant's instructions twenty-four and seventeen as requested by Appellant, he was deprived of complete instruction on his theories of the case.

Appellant was entitled to an instruction on operational negligence and to an instruction on the duty owed him by his employer.

For the foregoing reasons it is respectfully submitted that the judgment entered on the first and third causes of action should be reversed.

Dated: San Francisco, California, September 18, 1967.

DORSEY REDLAND
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BY

DORSEY REDLAND
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation
of the within Brief, I have examined Rules 18 and 19 of the
United States Court of Appeals for the Ninth Circuit, and that,
in my Opinion, the within Brief is in full compliance with
those Rules.

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IN THE

United States Court of Appeals
For the Ninth Circuit

DONALD E. BARKER,

Appellant,

vs.

GRACE LINE, a corporation,

Appellee.

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No. 21,839

IN THE

United States Court of Appeals
For the Ninth Circuit

DONALD E. BARKER,

Appellant,

vs.

GRACE LINE, a corporation,

Appellee.

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT

Appellant (plaintiff below) has appealed from an adverse judgment: (1) of dismissal on the pleadings as to one cause of action, and (2) entered on a defense verdict as to certain other causes of action. The action was brought in the United States District Court by a seaman against his shipowner employer for personal injuries incurred while employed aboard the vessel. Jurisdiction was claimed under the Jones Act (46 USC § 688) and under the General Maritime Law (Art. III, Constit. of U.S.). Jurisdiction on appeal is under 28 USC § 1291.

II.

STATEMENT OF THE FACTS

Appellant's statement of the facts (Appellant's Opening Brief, pages 3-4) is not wholly correct or

complete, failing to state certain undisputed facts and (where there was a conflict in the testimony) stating the version most favorable to appellant, even though this version was apparently not believed by the jury. For this reason we believe it necessary that the facts be restated herein.

Appellant was employed as a relief purser for a single voyage on the SS SANTA FLAVIA (Rep. Tr. p. 157), a vessel owned and operated by appellee (Rep. Tr. p. 121). In the evening of May 22, 1965, the vessel arrived at the port of Manzanillo, Mexico, being secured to the dock at approximately 9:30 P.M. on that date. (Rep. Tr. p. 11.) Appellant, having completed his duties as purser, went ashore on leave on his own business for the purpose of securing a haircut. (Rep. Tr. p. 14.)

The dock to which the vessel was secured was owned by the Mexican government and was not under appellee's ownership or control. (Rep. Tr. p. 122.) The dock was a modern concrete dock several hundred feet in length with a shed or warehouse running almost the length of the dock. On either side of the warehouse there was an open apron with railroad tracks, permitting vessels to be berthed on both sides of the dock. (Rep. Tr. pp. 122-123.)

It was dark at the time, but the dock area was well lighted from lights over the warehouse doors and from the vessel's cargo lights. (Rep. Tr. pp. 61-63, pp. 123-124.) Cargo operations were in progress, and in order to avoid these, appellant, having descended the gangway toward the after end of the vessel, walked across

the apron and proceeded towards shore close to the warehouse wall. (Rep. Tr. pp. 18-19, pp. 59-61.) He followed this lighted and paved route several hundred feet to the end of the warehouse building, at which point the lighted and paved way crossed over to the other side of the dock and thence via a paved and lighted way into town. (Rep. Tr. pp. 159-160; Defendant's Exh. C.) Instead of following this paved and lighted way appellant chose to proceed directly ahead into a dark area along an unpaved railroad track. (Rep. Tr. pp. 64-65, p. 130.) While proceeding into this area appellant fell into a hole some two feet deep and two feet in diameter in the rough unpaved area between the railroad rails (Rep. Tr. p. 21, pp. 129-130.) The hole was some 40 to 50 feet on land from the end of the pier (Rep. Tr. p. 140), some 65 or 70 feet from the nearest lights on the dock (Rep. Tr. p. 129), and approximately 150 feet from the bow of the vessel (Rep. Tr. p. 67). As a result of this fall appellant sustained injuries to his right leg.

The statement of facts in Appellant's Opening Brief (page 4) refers to testimony introduced by appellant that it was customary on vessels to post warnings of known hazards. This statement by appellant ignores the contrary evidence on this point, which was obviously believed by the jury which answered "no" to each of the following special interrogatories (Cl. Tr. p. 111):

"Count I:

- a. Was defendant Grace Line, Inc. negligent in connection with the condition of the adjacent dock?

- b. Was defendant Grace Line, Inc. negligent in failing to warn plaintiff Donald Barker of the condition of the dock?"

Captain Staus (testifying on behalf of appellee) testified that the hazard was not known to him (Rep. Tr. p. 140), and Captain Mauldin (testifying on behalf of appellee) testified that there was no custom of inspecting a port for possible dangers and posting notice thereof, the only such posted notices being those required by local government decree or because of known enemy combat action. (Rep. Tr. pp. 171-173.)

Appellant's Complaint contained five causes of action, only two of which are involved in the present appeal. These are the first cause of action which charged negligence for failure to provide appellant with a safe and proper means of access to and egress from the vessel (Cl. Tr. p. 3), and the third cause of action which charged the vessel was unseaworthy for the same alleged failure (Cl. Tr. pp. 4-5). (Of the other three causes of action contained in the Complaint, that for maintenance and cure was withdrawn by appellant, and the jury's verdict and findings on special interrogatories as to the causes of action charging negligence and unseaworthiness for failure to furnish proper medical care, etc. are not challenged by appellant on this appeal.)

As to the two causes of action which are involved in this appeal, appellee prior to trial moved for summary judgment of dismissal as to the first cause of action and for dismissal on the pleadings as to the

third cause of action. (Cl. Tr. p. 38, et seq.) Appellee's motion was denied as to the first cause of action but was granted as to the third cause of action, which was ordered dismissed. (Cl. Tr. p. 99.) Appellant was permitted by the trial Court to go to the jury on the issues raised by the first cause of action, the jury returning a defense verdict and answering the special interrogatories in the negative. (See p. 4 of this brief.) The present appeal is from the judgment of dismissal as to the third cause of action and from the judgment entered on the defense verdict as to the first cause of action.

III.

ARGUMENT

1. SUMMARY OF ARGUMENT

Appellant, in his Opening Brief, argues as to the third cause of action that a vessel may be rendered unseaworthy because of a dangerous condition on a dock ashore, and argues as to the first cause of action that the jury's verdict for appellee should be set aside for alleged errors in the Court's instructions.

Appellee in response submits with respect to the unseaworthiness question that a condition on a dock or ashore far removed from the vessel cannot render the vessel unseaworthy. Appellee further submits with respect to the negligence question that there were no errors in the trial court's instructions which would justify a reversal of the jury's defense verdict, and further submits that appellant was not entitled under

the applicable law to have these issues submitted to the jury, since appellee was entitled to summary judgment dismissing this cause of action.

2. A DANGEROUS CONDITION ON A DOCK OR ASHORE DOES NOT RENDER A VESSEL UNSEAWORTHY

a. The Doctrine of Unseaworthiness.

The major portion of appellant's Opening Brief (pp. 9-30) is devoted to a lengthy and somewhat involved argument on the doctrine of unseaworthiness. A very substantial number of cases are cited by appellant, but no case cited holds or even suggests that a vessel may be rendered unseaworthy because of a dangerous condition on a dock or ashore in an area far removed from the vessel's activities. Appellee submits that a dangerous or unsafe condition on a dock or ashore cannot under the law be held to render a vessel unseaworthy so as to entitle a seaman to recover on that ground. While the doctrine of unseaworthiness has been markedly expanded in recent years, it still relates to the unseaworthiness of *the vessel*. The nature of the doctrine is well stated by the Supreme Court of the United States in *Alaska Steamship Co. v. Petterson*, 347 US 396, 98 L.ed. 798 (1954), as follows:

“The doctrine of seaworthiness was stated as a settled proposition in *The Osceola*, 189 US 158, 175, 47 L.ed. 760, 23 S.Ct. 487, as follows:

‘That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of

the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.’

“That doctrine was a natural outgrowth of the dependence of a ship’s crew upon the seaworthiness of the ship and its equipment.”

Similarly, the Supreme Court in *Mitchell v. Trawler Racer*, 362 U.S. 539, 4 L.Ed.2d 941 (1960) stated:

“The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.”

In the recent case of *Waldron v. Moore-McCormack Lines, Inc.*, 356 Fed.2d 247, 1966 A.M.C. 1844 (C.A. 2d Cir. 1966), Judge Medina, in reviewing the historical background and development of unseaworthiness, stated:

“But the basic three-fold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide ‘a vessel reasonably suited for her intended service’.”

Not one of the cases cited by appellant goes beyond this basic concept and none of them would support or justify a holding that a vessel may be rendered unseaworthy because of a dangerous condition on a dock or ashore far removed from the vessel’s activities.

b. Appellant’s Review of the Earlier Cases on Unseaworthiness.

In counsel’s survey of the earlier cases (pp. 9-17 of Appellant’s Opening Brief) it is suggested that Mr.

Justice Brown in writing his opinion in *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903):

"... had in mind an obligation of the shipowner considerably broader than merely supplying a stout hull and proper appliances, gear and appurtenances." (Appellant's Opening Brief, p. 11.)

The cases cited in behalf of this speculative and novel proposition furnish little support for it.

- a. In *Scarff v. Metcalf*, 107 N.Y. 211, 13 N.E. 796 (Ct. of Appeals N.Y., 1887) there is no mention of unseaworthiness, liability being based upon failure to furnish proper medical care to an injured seaman.
- b. *Dixon v. The Cyrus*, Fed. Case 3930, 7 Fed. Cas. 755 (D.C. Penn. 1789);
The Noddeburn, 28 F. 855 (D.C. Ore. 1886);
The Edith Godden, 23 F. 43 (D.C. S.D. N.Y. 1885);
The A. Heaton, 43 F. 592 (Cir. Ct. Mass. 1890); and
The Julia Fowler, 49 F. 277 (D.C. S.D. N.Y. 1892);
 all involved failures of the vessel's rigging, ropes or gear;
- c. *The Wanonah*, Fed. Case No. 17412, 29 Fed. Cas. 697 (D.C. Maine 1875) involved the vessel's age and lack of repair;
- d. *The Heroe*, 21 F. 525 (D.C. Del. 1884) involved defects in the vessel's engines;
- e. *Olson v. Flavel*, 34 F. 477 (D.C. Ore. 1888) involved the vessel's gangway; and

- f. *The Bark Cann*, 2 F. 241 (2nd Cir. 1880); and *The Frank and Willie*, 45 F. 494 (D.C. S.D. N.Y. 1891) involved improper stowage of dunnage and lumber aboard the respective vessels.

Clearly, each of these cases involved defects *aboard the vessel* and certainly none of them go beyond a condition on the vessel. Counsel states (p. 17, Appellant's Opening Brief) that:

"A fair appraisal of what constitutes unseaworthiness in the light of the foregoing cases and as the law existed at the time of the pronouncement of the second proposition in *The Osceola* is that unseaworthiness consists of a failure to provide a seaman with a safe place in which to work."

We submit that counsel's statement is unsupported by the cited authorities and that in fact a fair appraisal of what constitutes unseaworthiness is the existence of a defective or dangerous condition on *the vessel*, including its hull, appliances, gear and (more recently) its manning.

c. Place of Work.

Appellant's next argument (p. 17-23 of Appellant's Opening Brief) is headnoted:

"A vessel is rendered unseaworthy by reason of dangerous conditions ashore which render the place in which the seaman works unsafe."

Not only is this statement incorrect, but it would appear to be wholly inapplicable in the present case, since appellant was injured, not in a place in which

he was working, but in an area far removed from the vessel while he was proceeding on leave ashore upon his own business. The five cases cited by appellant certainly do not sustain appellant's proposition, since four of them involved injuries caused by defects in unloading equipment during unloading processes, and the fifth case involved the impact ashore of an unseaworthy condition created aboard the vessel.

It is quite clear that in the first case cited by counsel (*DeSalvo v. Cunard Steamship Co., Ltd.*, 171 F.Supp. 813 (D.C. S.D. N.Y. 1959)) the injury was due to improper use of ship's equipment. This is perfectly apparent from the court's instructions on unseaworthiness (pp. 816-817) and from the court's statement at page 820, that:

“In any event the passenger baggage chute must be treated as ‘ship's equipment’. It was used only for the purpose of loading the ship with passenger baggage. It was owned by defendant and used only by defendant for servicing its ships at Pier 92.”

This Court in *Huff v. Matson Navigation Co.*, 338 F.2d 205 (C.A. 9th Cir. 1964) held that the fact that an unloading device was furnished by the stevedore did not change the shipowner's duty to furnish seaworthy equipment for unloading purposes.

“Under all of these Supreme Court decisions it is plain that the fact that the stevedoring company brought this unloading device to or into the ship in no manner lessens the shipowner's absolute obligation of seaworthiness which extends to the loading or unloading equipment furnished by the stevedoring company.” (P. 212.)

This Court's decision was followed in the third and fifth circuits in the cited cases of *Spann v. Lauritzen*, 344 F.2d 204 (C.A. 3rd Cir. 1965) and *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (C.A. 5th Cir. 1956). In all of these cases, however, the courts have made quite clear that the warranty of seaworthiness involves the vessel's hull, gear, and stowage and also its appurtenant appliances and equipment, but they do not extend the warranty further. The cases have also made clear that the shipowner is not relieved of this obligation because the defective equipment was owned and operated by the stevedore rather than by the shipowner and was only temporarily used aboard the vessel.

The remaining case cited by appellant in this section of Appellant's Opening Brief (*Gutierrez v. Waterman Steamship Corp.*, 273 U.S. 206, 85 S.Ct. 1185, 10 L.Ed.2d 297 (1963)) involved injuries suffered by a longshoreman on the dock as a result of cargo spilled during discharge of the ship because of defective cargo containers which were held to create an unseaworthy condition. The Supreme Court pointed out that liability may exist where the *impact* of the unseaworthy condition is felt on shore but that the question of unseaworthiness relates to the vessel itself.

"These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." 10 L.Ed.2d 303.

The Court in the *Gutierrez* case also bases its conclusion upon other cases where the impact of the unseaworthy condition aboard the vessel was felt upon shore, as where longshoremen on the dock were injured when cargo fell upon them because of the ship's defective cable or winch.

Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (C.A. 2nd Cir. 1950);

Hagans v. Farrell Lines, Inc., 237 F.2d 477 (C.A. 3rd Cir. 1956).

We submit that the authorities cited by appellant do not sustain his position, and they most certainly do not sustain the general proposition that a vessel may be unseaworthy because of a dangerous condition on a dock or ashore some distance from the vessel.

d. Access to the Vessel.

Appellant devotes pages 24 through 26 of his opening brief to the proposition that a vessel may be unseaworthy because of failure to provide a safe means of access to and egress from the vessel. This proposition may be taken as correct where it is limited to the area of immediate access to the vessel by way of the vessel's gangway or ladder, regardless of whether the particular gangway or ladder is furnished by the vessel or is a substitute provided for the purpose. The cases cited by appellant are all gangway or ladder cases and are clearly limited to the duty to provide a means of passage between the vessel and the dock to which it is moored. (*Buch v. United States*, 122 F. Supp. 25 (D.C. S.D. N.Y. 1954) and *Pederson v.*

United States, 224 F.2d 212 (C.A. 2nd Cir. 1955) (incorrectly titled and cited at p. 25 of Appellant's Opening Brief) are both ladder cases, while *Bradshaw v. The Carol Ann*, 163 F.Supp. 366, 1958 A.M.C. 962 (D.C., S.D. Texas, 1956) (also incorrectly cited at p. 25 of Appellant's Opening Brief) involved the use of an intervening vessel as a gangway between the vessel and the dock.) The cited cases are certainly not authority for the position urged by appellant that a dangerous or defective condition several hundred feet away from the vessel along a dock or ashore will render the vessel unseaworthy.

e. In the Service of the Ship.

Appellant makes a final contention (pp. 26-30 of Appellant's Opening Brief) that appellant was on "the business of the ship" at the time of his accident. This is wholly incorrect, since (as noted previously) appellant was going ashore on leave for purposes of his own and was not engaged in any ship's business. It is quite true (as held in the first of the cases cited by appellant) that appellant under such circumstances would have been in the course of his employment for purposes of maintenance and cure (*Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1943)), but this has no bearing on the issue of unseaworthiness.

The second case cited by appellant (*Marceau v. Great Lakes Transit Co.*, 146 F.2d 416 (C.A. 2nd Cir.) (1945)) was a Jones Act case in which recovery was allowed to a seaman returning from shore leave who was injured on the dock immediately ad-

jacent to the foot of the vessel's gangway. Appellant in his discussion of the case, however, fails to point out that the dangerous condition on the dock had been created through the negligence of the vessel in sweeping debris from the vessel on to the dock and placing the vessel's gangway in that area without providing proper light.

The third case cited by appellant to sustain his contention (*Braen v. Pfeifer Oil Transport Co.*, 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed.2d 191 (1959)) was also a Jones Act case, and recovery was permitted where the seaman was working on a barge being used as a gangway between his vessel and the dock. Counsel states (p. 29 of Appellant's Opening Brief) that the case "is dispositive of this question". We submit, however, that it is not only "dispositive", but is wholly irrelevant to counsel's apparent proposition that a seaman proceeding along a dock on shore leave is "on the business of the ship" and hence entitled to recover upon the ground of unseaworthiness of the ship because of a defect or dangerous condition of the dock far removed from the vessel.

It seems quite clear that the cited authorities relating to maintenance and cure and to negligence under the Jones Act simply have no bearing on the proposition urged by appellant.

f. Conclusion.

We again submit that the doctrine of unseaworthiness is related to unseaworthiness of the vessel itself and that there is no basis in law or in fact for appellant's contention that the hole in the dock far re-

moved from the vessel could in any way render the vessel itself unseaworthy. Under almost identical circumstances where a seaman was injured on a trestle while returning from shore leave the Court in *Dan-govich v. Isthmian Lines, Inc.*, 218 F.Supp. 235 (D.C. S.D. N.Y. 1963), stated:

“Plaintiff’s action is versed in both negligence and unseaworthiness. No evidence has been advanced by the plaintiff that in any way could be interpreted as proving the defendant’s vessel was unseaworthy.” (P. 236.)

And the Court in *D’Costa v. U. S. Lines Co.*, 227 F. Supp. 180 (D.C. S.D. N.Y. 1964) where a seaman was injured on a city street while returning from shore leave stated:

“On these facts there is no possible basis for a claim that the vessel was unseaworthy.” (P. 181.)

It is submitted that the Court below was correct in granting appellee’s motion for dismissal of the third cause of action of appellant’s complaint, since the alleged dangerous condition of the dock or ashore far from the vessel’s gangway could in no conceivable way render the vessel itself unseaworthy.

3. THERE WERE NO ERRORS IN THE TRIAL COURT’S INSTRUCTIONS WHICH WOULD JUSTIFY A REVERSAL OF THE JURY’S DEFENSE VERDICT

a. Appellant’s Contentions.

Appellant charges errors in the Court’s instructions to the jury with respect to the first cause of action of the complaint (which charged negligence for failure to provide appellant with a safe and proper means of

access to and egress from the vessel). Appellant charges that the Court erred in modifying three of appellant's proposed instructions (Nos. 2, 6 and 28) and in refusing to give two of appellant's proposed instructions (Nos. 24 and 17).

Appellee submits that the Court did not err, either in modifying or in refusing the instructions in question, and appellee further submits that even if there were any error in the instructions it would not be grounds for reversal, since appellant was not entitled to have the issues under the first cause of action submitted to the jury, since appellee was entitled to summary judgment or a directed verdict as to this cause of action.

b. The Trial Court Committed No Error in Modifying Appellant's Proposed Instructions Nos. 2, 6 and 28.

Appellant has set out in Appellant's Opening Brief (pp. 30-36) the three instructions as to which error is claimed by reason of the Court's modifying the proposed instructions by striking portions thereof. It is quite apparent with respect to all three of the instructions that the material stricken by the Court was entirely redundant and repetitious, and consequently was both unnecessary and improper.

We do not believe that it requires any citation of authorities to support the proposition that a court's instructions to a jury are the court's own and are to be couched in the court's own language. Such instructions need not be stated in the precise language required by counsel, provided that the instructions when considered as a whole are full and correct. It is also

quite clear the Court need not give repetitious instructions which would give undue emphasis to any particular issue on theory. A reading of the Court's instructions as given in the present case and a reading of the repetitious language which was stricken makes it apparent that the Court fully instructed the jury under appellant's theory of the case.

Counsel argues that a party is entitled under Rule 51 of the Federal Rules of Civil Procedure to instructions on every theory of the case having substantial support in the evidence. While a party may be entitled to have a theory stated, he is certainly not entitled to have it repeated and reiterated as if it were contained in a Tibetan prayer-wheel or a cracked phonograph record.

c. The Trial Court Properly Refused to Give Appellant's Proposed Instructions Nos. 24 and 17.

Appellant has set forth in his opening brief (pp. 37-40) the two refused instructions in question. A simple reading of these instructions makes it quite clear that they are wholly improper and that the trial Court did not err in refusing to give them.

Appellant's proposed Instruction No. 24 is both argumentative and incorrect as a statement of law. It is argumentative in the multiple references in its first paragraph to issues outside of the evidence and in its statement in the second paragraph as to reasons for the alleged rule of law. Basically, however, it is improper as a wholly incorrect statement of the law in its reference to a "higher degree of care". The gravamen of a Jones Act case is negligence and the

standard of care is that which is reasonable under the circumstances. A minimal quantum of proof may be sufficient to uphold a finding of negligence under the Jones Act, but this would not justify the proposed instruction.

The concept of "negligence" under the Jones Act is discussed at length in *Vickers v. Tumey*, 290 F.2d 426 (C.A., 5th Cir., 1961), and has been repeatedly stated by this Court in such cases as:

DeZon v. American President Lines, 129 F.2d 404 (C.C.A. 9th Cir., 1942); aff'd 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943);

Sundberg v. Washington Fish and Oyster Co., 138 F.2d 801 (C.C.A., 9th Cir., 1943);

American Pacific Whaling Co. v. Kristensen, 93 F.2d 17 (C.C.A., 9th Cir., 1937).

The authorities cited by appellant's counsel in support of the proposed instruction would not in any way support the legal position urged. *Armit v. Loveland* and *The State of Maryland* relate only to the quantum of proof required to sustain a finding of negligence; *The H. A. Scandret*, *Krey v. U.S.*, and *Storgard v. France & Canada S.S. Corp.* are all concerned with unseaworthiness rather than negligence; and the Supreme Court in *Braen v. Pfeifer Oil Transp. Co.* was concerned with the question of "course of employment" rather than the standard of care. No authority has been cited which would justify the proposed instruction.

Appellant's proposed Instruction No. 17 is so grossly argumentative and improper as to require

little discussion here. The first three lines would seem to be proper.

“In determining the question of shipowners negligence under the Jones Act, you may consider all the factors and circumstances in the case.”,

but the balance is wholly and totally improper as an instruction to a jury. It sets out in an entirely argumentative fashion some but by no means all of the alleged factors and circumstances which the jury might consider. We respectfully submit that the giving of such an instruction would constitute gross error which would most certainly have justified the setting aside of a favorable verdict for appellant had the jury brought in such a verdict.

We are at a loss to understand the relevance of counsel's argument at pages 40-42 of Appellant's Opening Brief to the effect that “operating negligence” may create an unseaworthy condition aboard a vessel. This may or may not be a correct statement of the law, but since the first cause of action is based upon negligence under the Jones Act, we fail to see the applicability of counsel's argument. It might or might not be relevant to a proposed instruction on unseaworthiness, but it can hardly constitute authority that an argumentative and prolix proposed instruction on negligence is proper.

d. The Issues Under the First Cause of Action Should Not Have Been Submitted to the Jury.

Assuming arguendo that the Court erred in modifying or refusing the instructions discussed above, appellee respectfully submits that any such error

would not be a ground for reversal herein, since appellant was not entitled to have any issue under the first cause of action submitted to the jury.

The first cause of action of the complaint charges negligence with respect to the alleged dangerous condition of the dock and appellee's failure to inspect and warn appellant of the danger. The evidence was undisputed that the dock was not owned or controlled by appellee (being owned and controlled by the Mexican government) and that appellant was going on shore leave at the time of his injury. The authorities are clear that under such circumstances a shipowner has no duty to provide a seaman on shore leave a safe means of ingress or egress from the vessel beyond the gangway, and consequently the shipowner is not liable to a seaman on shore leave for unsafe conditions in places beyond the gangway not under the shipowner's control if the unsafe condition has not been created by the shipowner.

Todahl v. Sudden & Christenson, 5 F.2d 462 (C.C.A. 9th, 1925) 1925 A.M.C. 849;

Aguilar v. Standard Oil Co., 318 U.S. 724, 87 L.Ed. 1107 (1943 A.M.C. 451);

Lemon v. U.S., 68 Fed. Supp. 793, 1946 A.M.C. 1640 (D.C. Md. 1946);

Farrell v. U.S., 167 F.2d 781 (C.A. 2nd Cir., 1948); aff'd 336 U.S. 511, 93 L.Ed. 850 (1949);

Wheeler v. West India S.S. Co., 103 F. Supp. 631, 1952 A.M.C. 148 (D.C. S.D. N.Y.) (1951); aff'd per curiam, 205 F.2d 354 (C.A. 2nd Cir.); cert. denied 346 U.S. 889, 98 L.Ed. 393 (1953);

- Paul v. U.S.*, 205 F.2d 38, 1953 A.M.C. 1000 (C.A. 3rd Cir.);
- Thurman v. Alcoa S.S. Co., Inc.*, 1955 A.M.C. 1056 (D.C. S.D. N.Y. 1955); aff'd 229 F.2d 73, 1956 A.M.C. 323 (C.A. 2nd Cir.);
- Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235 (D.C. S.D. N.Y. 1963); aff'd 327 F.2d 355 (C.A. 2nd Cir., 1964);
- Martinez v. S.S. Hawaiian Retailer*, 1963 A.M.C. 1188 (D.C. S.D. Ga., 1963);
- Trost v. American Hawaiian S.S. Co.*, 324 F.2d 225 (C.A. 2nd Cir., 1963) cert. denied 376 U.S. 963, 11 L.Ed. 981 (1964);
- D'Costa v. U.S. Lines Co.*, 227 F. Supp. 180 (D.C. S.D. N.Y., 1964).

Of the cases cited above *Todahl*, *Aguilar*, *Farrell*, *Wheeler*, *Hall*, *Dangovich* and *Martinez* involved injuries on a dock or wharf, while the other cases involved other areas away from the vessel.

It is further clear from the authorities that the shipowner has no duty to a seaman going on shore leave to inspect and warn of possible dangerous conditions in a shore area beyond the shipowner's control.

- Farrell v. U.S.*, supra;
- Wheeler v. West India S.S. Co.*, supra;
- Paul v. U.S.*, supra;
- Dangovich v. Isthmian Lines, Inc.*, supra;
- Trost v. American Hawaiian S.S. Co.*, supra.

Where the facts are undisputed (as here) the question becomes one of law rather than one of fact to go to the jury. On this basis summary judgment for

defendant was granted in the *Martinez* and *D'Costa* cases, judgment on the pleading (on demurrer or exceptions) for defendant was granted in the *Todahl* and *Lemon* cases, judgment for defendant notwithstanding a verdict for plaintiff was granted in the *Wheeler* case, and judgment for plaintiff was reversed in the *Trost* case.

Appellee submits that under the above line of authorities appellee was entitled to have the issues under the first cause of action withdrawn from the jury's consideration, either by way of summary judgment or by a directed verdict for appellee as to that cause of action. Since appellant was not entitled to have these issues considered by the jury, appellant is in no position to complain as to any possible error in the trial Court's instructions in submitting this cause of action to the jury.

IV.

CONCLUSION

Appellee submits that appellant has demonstrated no error in the judgment of the Court below which would be grounds for reversal of that judgment.

The Court's judgment of dismissal on the pleadings as to the third cause of action was properly granted as there was no issue of fact to go to the jury on the question of whether the vessel could have been rendered unseaworthy because of a condition existing on a dock or ashore far removed from the vessel.

There were no errors in the Court's instructions which could possibly justify a reversal of the judg-

ment entered on the jury's defense verdict on the first cause of action. The jury was fully instructed in accordance with appellant's theory of the law and appellant has no basis for criticism of the instructions. Appellee further submits that appellant was not entitled to have the issues under the first cause of action submitted to the jury, since appellee was entitled to summary judgment of dismissal as regards this cause of action.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
October 15, 1967.

WILLIAM R. WALLACE,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of the within Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the within Brief is in full compliance with those Rules.

JOHN R. PASCOE,
Attorney for Appellee.

No. 21,840 ✓

**United States Court of Appeals
For the Ninth Circuit**

EDWIN CORDEIRO and EDMUND LEWIS
(individually and doing business as
CORDEIRO AND LEWIS APPLIANCES),

Appellants,

VS.

AMERICAN HOME ASSURANCE COMPANY
(a corporation),

Appellee.

**Appeal from the Judgment of the United States District Court,
Eastern District of California at
Fresno, California**

Honorable M. D. Crocker, Judge

APPELLANTS' OPENING BRIEF

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WM B. CUCKER



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No. 21,840

United States Court of Appeals For the Ninth Circuit

EDWIN CORDEIRO and EDMUND LEWIS
(individually and doing business as
CORDEIRO AND LEWIS APPLIANCES),

Appellants,

VS.

AMERICAN HOME ASSURANCE COMPANY
(a corporation),

Appellee.

Appeal from the Judgment of the United States District Court,
Eastern District of California at
Fresno, California
Honorable M. D. Crocker, Judge

APPELLANTS' OPENING BRIEF

I. JURISDICTION OF THE UNITED STATES COURT OF APPEALS.

This action was commenced in the Superior Court of the State of California in and for the County of Merced (CT 1-8) and on the petition of defendant (CT 11-14) was removed to the United States District Court for the Eastern District of California on the grounds of diversity of citizenship under the provisions of 28 United States Code Section 1441 (a).

The findings (CT 83:5-23) establish the requisite diversity and jurisdictional amount.

A final judgment was entered in favor of the defendant on February 23, 1967 (CT 87); a motion for new trial (CT 88-91) and motion for amendments to findings (CT 91-93) were filed March 6, 1967 and argued and denied on March 27, 1967 (CT 100). Notice of appeal to this Court was filed April 26, 1967 (CT 101-103).

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II. STATEMENT OF THE CASE.

This is an appeal by the plaintiffs from an adverse judgment in an action on a fire insurance policy.

Defendants issued to plaintiffs a fire insurance policy (Plaintiffs' Exhibit No. 6) on personal property in a store at 1032 Sixth Street, Los Banos, California, with a policy limit of \$50,000; later, an endorsement added property at 1105 Sixth Street, Los Banos, with a purported limit of \$25,000.

Fire destroyed the property at 1105 Sixth Street and plaintiffs sought in this action to compel defendant to pay plaintiffs the sum of \$17,185.35 on account of a fire loss admittedly sustained by plaintiffs over and above the amount of \$25,000 conceded by defendants to be payable (and paid) under Endorsement No. 1 of the policy (Plaintiffs' Exhibit No. 6) as written.

Plaintiffs relied on the doctrine of estoppel and mistake.

Findings of the trial court (CT 82-86) were adverse on both issues and judgment denying relief was entered (CT 87).

Plaintiffs' motion for new trial (CT 88-99) and motion for amendments to the findings under Rule 52 (b) were denied (CT 100) and this appeal followed.

III. SPECIFICATION OF ERRORS.

1. Defendant is estopped as a matter of law to deny coverage in an amount sufficient to indemnify plaintiffs for the conceded amount of their loss over and above the amount defendant claims is payable under the policy as written; the contrary finding (CT 85:27-29) is erroneous as a matter of law;

2. In view of the reporting form furnished plaintiffs by defendant, the terms of the policy which denied plaintiffs protection even though they were charged a premium for such protection were contrary to public policy; the implied finding (CT 84:10-14) that such a provision could cut down the protection the plaintiffs paid for, needed and had reason to believe they were receiving is contrary to law;

3. The finding (CT 84:16-20) that defendant's agent Hoffman "handled all the negotiations on behalf of both plaintiffs" and told plaintiffs "that the limit of liability on the fire insurance on the new location was \$25,000.00" is not supported by substantial

evidence and is further insufficient to support the judgment in that it wholly fails to find whether plaintiffs knew or should have reasonably known or realized that their coverage at the new location was limited to \$25,000;

4. The finding (CT 84:22-24) that plaintiff Edwin Cordeiro “never specifically requested insurance in any greater amount of [*sic*] the new location than \$25,000” is confusing and contradictory;

5. It was error for the trial court to refuse to amend the findings in accordance with plaintiffs’ motion (CT 91-93) and thus to enable plaintiffs and this Court to determine the basis for the trial court’s determination that plaintiffs were not covered with respect to their conceded loss of \$17,185.35 over and above the amount defendant contends is its limit of liability;

6. It was error for the trial court to deny plaintiffs’ motion for new trial;

7. It was error for the trial court to sustain appellee’s (defendant’s) objection to examination of witness Girdlestone (vice-president in charge of property writing for defendant) on his familiarity with or use of Standard Form Bureau Form 448 (Plaintiffs’ Exhibit No. 9 for identification); such evidence would have shown that a report form was known to defendant and was available for use but not used by defendant, and that, had it been used in this case, plaintiffs would have been put on immediate notice of the purported limitation of coverage on the new loca-

tion; objection was made on the ground that the evidence was "entirely immaterial" (RT 119:22-121:6).

IV. STATEMENT OF FACTS.

The following facts were established without substantial conflict in the evidence:

The plaintiffs, for many years prior to 1963, were doing a mercantile business as copartners at 1032 Sixth Street, Los Banos, California (RT 40-41). In describing the business plaintiff Cordeiro testified:

"We had a full appliance line, sir, which includes white goods, refrigerators, freezers, washers and dryers and so on; also a TV line, which includes TVs and stereos and at that time no color and then we had a complete line of toys, housewares—now, housewares includes complete housewares, pots and pans and small appliances; we had a record department and giftware."

(RT 41:16-22.)

For many years Harry Miller had been acquainted with the plaintiffs and had handled their insurance problems (RT 15:17-16:10). Miller was a general agent of the defendant insurance company (see Plaintiffs' Exhibits 1, 2, 3 and 4) and was in fact the agent who signed on behalf of the defendant the insurance policy involved in this litigation (Plaintiffs' Exhibit 6).

Under date of April 18, 1963 the defendant through agent Miller had issued to plaintiffs an insurance policy providing indemnity for damage to stock and equipment at the store located at 1032 Sixth Street,

referred to as the “old location”. That policy by its terms provided coverage for loss up to \$50,000.

The policy was a “reporting form” of policy, and was entitled “mercantile block floater” (RT 44; RT 91-96). It was a recent development in the insurance business and Miller had not had much experience with it (RT 17-19).

The insured was required by the new policy (Plaintiffs’ Exhibit 6) to report to the insurance company on forms furnished by the company (Plaintiffs’ Exhibits 5 and 7) the amount of his inventory on a monthly basis; the premium charged was based on the inventory and, according to the express terms of the policy—and the concession of the defendant—the premium is charged even though the amount of inventory reported *exceeds* the purported limits in the policy (RT 126-128 and paragraphs 11 and 13 of Plaintiffs’ Exhibit 6).

Cordeiro quoted Miller’s description of the block coverage as follows:

“... he told me that this would be a policy in which we would be fully covered, one hundred per cent, no matter how much our inventory would fluctuate, we would report every month and if the inventory went up or down we would always be covered, we didn’t have to worry about any other cases at all. He never stated any limitations at all to me.”

(RT 44:14-20.)

Hoffman, the defendant’s expert on block coverage (RT 125), was present when Miller placed the block coverage policy on plaintiffs’ store in April of 1963

and confirmed that the insured was not advised as to the limits of the insurer's liability.

Hoffman was asked (RT 140:7-13):

"Now, do you have any independent recollection, Mr. Hoffman, at the time you first met Mr. Cordeiro and first discussed with him this block coverage, any discussion at all on the subject of the limits of the company's liability in the event of damage by fire to property owned by Mr. Cordeiro and his partner? Or Mr. Cordeiro?"

The Witness: Yes.

Q. What was that discussion?

A. The limit of liability that was established.

Q. And did you tell them what limit of liability had been established?

A. No; we don't do that. It's up to the insured to establish the limit of liability."

(RT 140:14-21.)

* * * * *

"Q. All right. And on this particular occasion did Mr. Cordeiro tell you any specific amount of insurance that he was going to establish as the limit of liability on this policy?

A. I don't recall that."

(RT 141:8-17.)

The business prospered and the plaintiffs, in April of 1964, decided to buy out a furniture store—1105 Sixth Street—owned by Mr. Enos, located cater-cornered across the street, about 200 or 250 feet from the old location (RT 50).

Cordeiro called Harry Miller to come to discuss insurance (RT 52:3-9), and testified as follows respecting his meeting with Miller:

“Q. First of all, where did the conversation take place?

A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and that I was to move my office and everything to the furniture store and then we would keep the other store as-is, with giftware, records and housewares business with the two women. That is the extent of the conversation at that time.”

(RT 53:2-15.)

That conversation was not denied by Miller.

Hoffman came down to assist Miller in placing insurance on the new location, 1105 Sixth Street, and met with Miller and the plaintiffs at the new location (RT 32).

Concerning this meeting Miller testified (RT 33:11-20):

“This is going back two years ago. I can’t remember word-by-word. We discussed the coverage to some degree. It was pointed out that the heavy appliances and the stereos and everything was being moved over to the store and that’s what they were doing at the time.

Q. Who pointed that out to whom, sir?

A. There was Mr. Hoffman of American Home, there was myself, there was Mr. Cordeiro and there was Mr. Lewis and I can’t recall

whether Mr. Cordeiro was talking at the time or whether Mr. Lewis was talking at the time."

Miller was further examined:

"Q. Just one or two questions, Mr. Miller.

On the cross-examination, Mr. Miller, you stated that there were white goods, televisions and stereos at the new location when you were there with Mr. Hoffman and Mr. Cordeiro; is that correct?

A. That is correct."

(RT 35:20-25.)

"Q. Now, Mr. Miller——

A. They were moving things in.

Q. ——what do you mean by 'white goods'?

A. Well, refrigerators, freezers, washing machines, dryers, all the appliances that they handle.

Q. At the time that you were having your conversation, your conference there—incidentally, will you fix the time; approximately was that in April of 1964?

A. That is correct."

(RT 35:20 to RT 36:9.)

Plaintiff Cordeiro testified as follows concerning the meeting of April, 1964:

"A. When Mr. Hoffman came down, I was at the old store at the time and they met me there and we talked over there and walked across the street to the other store, so he could see the location and what we had there and what we were going to do and that's what we showed him.

Q. All right. Now, will you tell me the conversation you had with Mr. Hoffman or the con-

versation with Mr. Miller when Mr. Hoffman was present on the subject of insurance?

A. At that time, we stated we wanted the same insurance again; in other words, we were talking about the block form, and they said they would give us the same coverage. In fact, I told them that day we had the inventory complete and the equipment complete, because Mr. Enos and I had just finished the inventory and we had a complete form that we handed to Mr. Miller and Mr. Hoffman got it that day, in fact. It was the inventory of the new place now, only; we were talking about the furniture only and the equipment I bought from Mr. Enos.

Also, that day I explained to them that we were moving——

Q. Explained to whom?

A. Mr. Hoffman and Mr. Miller

Q. Yes.

A. ——that we were moving. In fact, I showed them the TVs and the stereos, how we displayed them with the furniture and how we tied in the furniture and the appliances together and we were going to run one operation there and we would be moving everything over—in fact, that day we were.

Q. When you say 'moving everything over', did you say where you were going to move it to?

A. The appliance and furniture store.

Q. All right. Now, when you got over to the furniture store what, if anything, was there?

A. Already we had, that one wall when you come in there on the K Street side of the building, we already had complete washers and dryers on the full wall, plus we had the ranges there already and we had two Hallmarks, which is just

a brand name, but two Hallmarks, which were on the right-hand side.

Q. What are Hallmarks?

A. They're custom ranges; they're worth about \$500 apiece.

Q. How many of them did you have there?

A. Two already there, sir. And we had, of course, our full line of TVs and stereos there already in the store.

Q. Now, how many TVs and stereos did you have there when Mr. Hoffman got there?

A. We're talking about probably 25 pieces.

Q. Now, you mentioned white goods, how many pieces of white goods were there when Mr. Hoffman got there?

A. Already we had probably there, the day we was moving, against that wall, we had 15 pieces of white goods there already; that's between your washers, dryers, ranges and the Hallmarks were there presently, besides what Eddie was bringing in that day.

Q. All right. Did you tell Mr. Hoffman what you were going to leave in the old store, the old location?

A. I just told him we were going to bring out appliances and run our furniture and appliances together in the new location, that we were just going to keep the inventory, as far as the other was concerned, strictly housewares, small appliances, records and giftware.

Q. Now, did Mr. Hoffman say anything about whether or not his company would cover you?

A. There was no doubt in my mind that we were——

Q. Well, what did he say? Did he say anything about the form of insurance?

A. That the block policy, of course, was the best and that is what we were going to get, just going to tie them all in as one."

(RT 54:7-57:5.)

Hoffman testified that he was aware that "appliances" were being moved into the new location, but stated he did not know how many items were being moved in (RT 157:10-22), and, in any event, neglected to inform himself as to how many or to tell his employer, the defendant, that *any* appliances were being moved (RT 157:3-6).

Hoffman testified that to him "appliances" meant stoves, washing machines, refrigerators, radios, television, and conceded, further, that the principal value of the inventory of the plaintiffs' business was in its line of appliances (RT 134:12-136:4).

Indeed the "mercantile block floater" issued as Rider No. 1 in the original policy (Plaintiffs' Exhibit No. 6) described the property insured as "consisting principally of appliances".

Endorsement No. 1, dated April 30, 1964, added the new location and changed the description of the property insured to "appliances and furniture" and purported to limit the coverage to \$25,000 on the new location. Cordeiro never saw the endorsement and the first knowledge he had that there was a limit of \$25,000 at the new premises came after the fire which destroyed them on November 2, 1964 (RT 58).

The defendant's own records (Plaintiffs' Exhibit 8) showed that *all* the value of the insured property was

allocated by defendant to appliances in 1964 during April (\$54,611.71), May (\$51,718.20), June (\$54,307.56), July (\$73,183), August (\$77,588), September (\$77,480) and October (\$47,080.96).

This schedule (Plaintiffs' Exhibit 8) was prepared and signed by the defendant's officers (RT 110) and was based on the reports which the plaintiffs, on forms furnished by defendant, had sent in to the defendant (Plaintiffs' Exhibit 7).

The defendant at no time ever objected to the form of monthly report submitted by the plaintiffs (RT 107:4-6). Five reports (including revision) had been received by defendant between the time the new store was added and the time it was destroyed by fire on November 2, 1964.

The only substantial conflict in the evidence involved the question of whether Hoffman told Cordeiro that the limit of coverage at the new location was to be \$25,000.

Hoffman testified he told Cordeiro the limit would be \$25,000 (RT 158), although he had previously testified that it was not customary to tell the insured anything at all about the limit of liability (RT 140:18-21).

Cordeiro testified that Hoffman did not inform him the limit of liability was \$25,000 (RT 75) and that he "kind of left it up to Mr. Miller and Mr. Hoffman to take care of that part of it" (RT 70:3-5).

The trial court found that "during . . . negotiations" Hoffman told Cordeiro that "the limits of lia-

bility on the fire insurance on the new location was \$25,000.00" (CT 84:16-20).

There was no finding that Cordeiro knew or understood or appreciated the significance of what Hoffman was found to have said concerning the limits.

Hoffman testified (over objection) that because of the nature of the new location he had no authority to approve insurance coverage on it for as much as \$50,000 (RT 159:12-21).*

Hoffman testified he did not tell Cordeiro that there was any limit on Hoffman's authority (RT 166:16-167:1).

Finally, Hoffman testified that he assured Cordeiro that he was getting "the best possible coverage" (RT 154:20-24) at the new location and that at the new location "I told him he had the same coverage that he had at the first location" (RT 155:2-3).

On November 2, 1964, fire destroyed the new location. Plaintiffs' agreed property loss was \$42,185.35. Defendant paid plaintiffs only \$25,000 and the plaintiffs sought through this action to recover the balance of \$17,185.35 (CT 85:8-12).

*The binder order (Defendant's Exhibit F) contemplated that Hoffman would inspect the premises; the report of his inspection (Defendant's Exhibit H) refers to the building as being a "three-story brick bldg. in good repair" with "housekeeping satisfactory"; there is no limitation of liability mentioned in the exhibit; Hoffman's written orders (Defendant's Exhibit E, presumably written at a time when Hoffman had forgotten that the appliances were being moved)—which were not communicated to the plaintiffs—is the only reference in the defendant's records to a \$25,000 limit on the insurance; after the fire, the defendant issued a policy with \$50,000 limits on yet a third site some four months before the site was given an inspection (RT 219:9-224:7).

It is our contention that both Miller, the defendant's general agent, and Hoffman, the defendant's special agent, knew that the appliance line was being moved from the old location to the new location, that defendant was aware such line constituted the principal value in the plaintiffs' inventory, that the plaintiffs informed the defendant's agents that they were in fact moving the appliance line to the new location, that the plaintiffs were assured by defendant's agent that they had the "best possible coverage" at the new location and that such coverage was "the same coverage that" the plaintiffs "had at the first location", that it was never brought home to the plaintiffs that the endorsement extending coverage to the new location carried limits of \$25,000 (or any other limits) and that after the bargain for coverage was struck the plaintiffs on at least five different occasions before the fire submitted written reports on forms furnished by the defendant (Plaintiffs' Exhibit 7) which required the plaintiffs to make a "*statement of values wherever located*" and led the plaintiffs additionally to believe that they were covered to the extent of their reported inventory "*wherever located*".

To a further discussion of these facts and to the principles of law on which we rely for a reversal we now turn.

V. ARGUMENT.

1. WHERE REPRESENTATIONS OR CONDUCT OF AN INSURER OR ITS AGENTS HAVE LED AN INSURED TO BELIEVE THAT IT WAS COVERED FOR A PERIL TECHNICALLY AND FORMALLY EXCLUDED FROM THE COVERAGE AFFORDED IN THE POLICY, THE INSURER WILL BE ESTOPPED TO DENY COVERAGE.

It was argued by defendant (CT 60-66) that the doctrine of estoppel could not be used to extend coverage to perils technically excluded from coverage under the formal provisions of an insurance policy.

Defendant's position is contrary to established law in this jurisdiction.

As stated in *Ivey v. United National Ind. etc.* (C.C.A. 9th Cir. 1958), 259 F.2d 205:

"Whatever may be the rule elsewhere, the California decisions dealing with the problem now presented to us indicate that under the law of that state an insurance company may by its conduct or dealings apart from the policy itself be estopped from denying that coverage has been furnished for a risk which the insured has been led to believe is protected under the policy".

The rule was recognized in *Beach v. USFG* (1962), 205 C.A.2d 490, where the court said at page 416:

"Under the principles laid down in *American Surety Co. v. Neise*, 136 Cal.App.2d 286 [289 P.2d 103]; *Mercer Cas. Co. v. Lewis*, 41 Cal.App. 2d 918 [108 P.2d 652]; *Bass v. Farmers Mutual Protective Fire Ins. Co.*, 21 Cal.App.2d 21 [68 P.2d 3062]; and *Golden Gate Motor Transport Co. v. American Indem. Co.*, 6 Cal.2d 439 [58 P.2d 3742], we conclude—where, as here, one, while negotiating for coverage with the insurer's

agent, properly brought all of the material facts relative to the transaction to his attention and specifically requested insurance coverage based thereon, was assured by the agent that such coverage could be, would be, and had been effected, and relied upon the agent's representation with the latter's knowledge, but through the agent's failure and neglect actually was not covered—that the insurer, chargeable with the knowledge and acts of his agent, may be estopped thereafter to rely upon the existence of those facts to deny or defeat coverage.”

In *Owen v. American Home Assurance Company* (D. Ct. Calif. No. Dist. 1957), 153 F. Supp. 928, Judge Halbert, speaking of the defendant insurer's agent, stated: “What he said and what he did, led the plaintiffs to believe that they would be covered” (153 F. Supp. 930).

In decreeing estoppel the court continued:

“The law in California is clear that where an insurance agent gives a *misleading, incorrect or incomplete* answer, without qualification (even though, perhaps, carelessly made) to a specific question by a prospective insured concerning coverage, the insurer is not, after reliance has been placed thereon by the insured, allowed to deny liability on the basis of a provision which is contrary to, and does not truly reflect, the representations of the agent” (citing many cases).

In *Tomerlin v. Canadian Indemnity Co.* (1964), 61 C.2d 638 at 645, the court quoted and approved *Raulet v. Northwestern etc. Insurance Co.* (1910), 157 Cal. 213, 230, as follows:

“‘The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder [limitations upon the agent’s authority].’”

The court concluded that the case before it was “essentially one of promissory estoppel” (61 C.2d at 649). See also, *Ames v. Employers Casualty Company* (1936), 16 C.A.2d 255 at 267, holding the doctrine obtains even though there has been “no meeting of minds”.

“The elements of prior dealing and transactional continuity” in a case where there had been “representations on the part of the agent that similar coverage would again be provided” were held by the California Supreme Court in *Granco Steel, Inc. v. Workmen’s Compensation Appeals Board* (1968) 68 Adv.Cal. 191, to be significant factors in determining that the doctrine of estoppel would bar an insurer from denying coverage.

See also analogous principles in the cases dealing with reformation such as *Modica v. Hartford, etc.* (1965), 236 C.A.2d 588; *Maier Brewing Company v. Pacific National Fire Insurance Company* (1963), 218 C.A.2d 869, and *Laing v. Occidental Life Insurance Company* (1966), 244 C.A.2d 811.

In order to allay any doubt that the doctrine of estoppel is applicable we have mentioned the legal principles under which we invoke the doctrine.

We turn now to a discussion of the facts which, we submit, require a finding of estoppel under the controlling rules of law, the undisputed evidence and the written instruments issued by defendant to the plaintiffs.

2. DEFENDANT IS ESTOPPED AS A MATTER OF LAW TO DENY COVERAGE IN AN AMOUNT SUFFICIENT TO INDEMNIFY PLAINTIFFS FOR THE CONCEDED AMOUNT OF THEIR LOSS OVER AND ABOVE THE AMOUNT DEFENDANT CLAIMS IS PAYABLE UNDER THE POLICY AS WRITTEN; THE CONTRARY FINDING (CT 85:27-29) IS ERRONEOUS AS A MATTER OF LAW.

Preliminarily, we suggest that a finding of no estoppel is actually one of law, "since it was based at least in part upon the application of a legal standard." *Kippen v. American Automatic Typewriter Company*, 324 F.2d 742 at 745 (9th Cir. 1963).

A comment on that case in 55 Calif. L.R. 1020, "Law-Fact Distinction", by Stephen A. Weiner, notes (at page 1055) that "the rule of free re-reviewability in *Kippen* is sound . . . because an appellate court should not be compelled to defer to a trial judge's application of law based on experience with human affairs".

Furthermore, since the question of whether there was an estoppel turns largely on the construction and effect of written instruments (Plaintiffs' Exhibits 5, 6 and 7 and Exhibit 9 for identification) and certain undisputed evidence, this Court is not bound by the determination of the trial court. *Estate of Wunderle*,

30 Cal.2d 274 at 280 (1947); *Trubowitch v. Riverbank Canning Company*, 30 Cal.2d 335 at 339 (1947); *Parsons v. Bristol Development Company*, 62 Cal.2d 861 at 865 (1965); and California Evidence Code § 310.

We respectfully direct this Court's attention to the role of defendant's agent Miller, to certain undisputed evidence, and, particularly, to the form of report (Plaintiffs' Exhibits 5 and 7) furnished by defendant for use by the plaintiffs and suggest that the finding of no estoppel, based on the claim that Hoffman told Cordeiro there were limits of \$25,000, ignores the role of Miller, certain undisputed testimony of Miller, Hoffman and Girdlestone, and the undisputed evidence of events which occurred *after* Hoffman's claimed warning to Cordeiro.

We point out the following facts which are either conceded or established by uncontroverted evidence:

(i) Defendant was aware that the principal value of plaintiffs' stock in trade, which it insured for \$50,000 at the old location (Rider No. 1 of Plaintiffs' Exhibit 6), consisted of appliances.

(Girdlestone: RT 97:4-98:2; Hoffman: RT 134:12-135:4.)

(ii) Cordeiro informed defendant's agent Miller that it was plaintiffs' intention to move the appliances to the new location (RT 53:2-15).

(iii) Miller testified he was aware that the appliances were being moved to the new location (RT 35:20-36:13).

(iv) Miller testified that Cordeiro or Lewis told defendant's agent Hoffman in Miller's presence that the appliances were being moved to the new location (RT 33:9-20). Cordeiro's testimony was in accord (RT 54:7-57:5).

(v) Hoffman testified he was aware that appliances were being moved to the new location "on display, for sale" (RT 146:15-147:5).

(vi) Although aware that appliances were being moved, Hoffman made no effort to ascertain how many appliances were being moved and neglected to inform the defendant that any appliances were being moved (RT 157:3-20 and 161:14-24). Concerning the appliances Hoffman was asked, "How many did they say they were moving in?" and answered, "I don't know" (RT 161:23-24).

(vii) Hoffman testified that he did not tell Cordeiro of the secret limitation imposed by defendant on Hoffman's authority which purportedly limited that authority to insure property at the new location for only \$25,000 (RT 161:2-12).

(viii) Had Hoffman advised Cordeiro that he had no authority to insure property at the new premises for any amount in excess of \$25,000, Hoffman would have driven home to Cordeiro the knowledge that the defendant was either unable or unwilling to afford adequate coverage.

(ix) Instead of revealing to Cordeiro the existence of the secret limitation on his authority (as required by *Tomerlin* and *Raulet, supra*) Hoffman ad-

mitted he told Cordeiro he was getting "the best possible coverage" (RT 154:20-24) at the new location and assured him that "he had the same coverage that he had at the first location" (RT 155:2-3), where the limit was concededly adequate.

(x) The form of report (Plaintiffs' Exhibits 5 and 7) defendant delivered to plaintiffs and instructed plaintiffs to use and its use by plaintiffs and its receipt and retention by defendant *without objection* on at least five separate occasions between the time the new premises were added and the time of the fire constituted an affirmative, continuing representation to the plaintiffs that they were insured at least up to the values listed "*wherever located*" and estopped defendant from denying coverage for the reported inventory "*wherever located*".

We have restated at some length the evidentiary predicate for our contention that the defendant is estopped as a matter of law in this action to deny plaintiffs the coverage which they needed, requested and were led to believe that they had received.

We are not here to reargue the evidence on the question of whether or not Hoffman told Cordeiro "that the limit of liability on the fire insurance on the new location was \$25,000" (CT 84:16-20).

The trial court made no finding that Cordeiro understood or appreciated the significance of Hoffman's statement (assuming it was made) and if the statement was heard by Cordeiro it was undoubtedly dis-

missed by Cordeiro as being without significance as establishing only an initial value or "provisional limit" which would be automatically increased after reports of inventory were made to the insurer, on forms furnished by the insurer, showing the "statement of values wherever located".

In this connection it must be recalled that Miller told Cordeiro (RT 44:14-20), "no matter how much our inventory would fluctuate, we would be covered, we would report every month and if the inventory went up or down we would always be covered . . .".

Having chosen a form of report from which the insured would reasonably conclude that property subject to the "multiple perils" described in the title of the report was covered "wherever located" when an unambiguous form of report was readily available (Plaintiffs' Exhibit 9 for identification, Standard Form Bureau Form 448), defendant must take the consequences of the ambiguity inherent in the form of report when read in light of all of the circumstances, particularly the assurances of Miller and Hoffman.

The form of report which the defendant required the plaintiffs to use contained no provision whatsoever for reporting difference addresses at which the insured property was kept. Plaintiffs' Exhibit 9 for identification, on the other hand, had defendant elected to use it, would have instantly put the assured on notice that values should be segregated as between the various premises described in the policy. Such a form would again have brought to the immediate attention of the defendant and its agents that more inventory

was being carried at the new location than was covered by its policy as amended.

In this connection we respectfully submit that it was error for the court to exclude Plaintiffs' Exhibit 9. Evidence of the custom or usage in a business or industry, i.e., the practice of others similarly situated or performing similar acts under similar conditions, is admissible to establish the standard of care in a given instance. *Hartford Accident and Indemnity Company v. Bank of America* (1963) 220 C.A.2d 545 at 561; see also "California Evidence" (2d Edition) by B. E. Witkin, San Francisco 1966, page 317.

Examination of the "mercantile block floater" (Rider No. 1) on the policy (Plaintiffs' Exhibit No. 6) might not have done much to clarify matters.

Thus, under paragraph 1 the "property insured" includes (last line) "the property of the insured wherever located". In paragraph 2 the policy recites: "This company shall not be liable under this policy for more than 100% of the following limits of liability in any one casualty or disaster: (a) \$50,000 at 1032 - 6th Street, Los Banos, California".

Those recitals, had they been read by the assured, would suggest that initially there was property at 1032 6th Street, Los Banos insured for \$50,000, that the company under paragraph 1 agreed to insure "wherever located", suggesting that if the property is moved from the place where it is originally described it will be insured "wherever located".

Paragraph 13 is equally mystifying to the unlearned: It relates to the so-called "full reporting"

requirements of the policy and provides that the liability of the company "shall in no event exceed a greater proportion of such loss or damage than the total value last reported by the Insured prior to such loss or damage bears to the actual values at risk hereunder as of the date for which such report was made. Any loss in excess of the limits of liability stated in this policy shall be borne by the Insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported."

What is meant by the phrase "such other insurance"? The policy itself has just informed the assured in paragraph 1 that the property of the insured is insured "wherever located", its initial location obviously being 1032 - 6th Street, Los Banos, California. If the amount of inventory is increased and reported (as was done in this instance) the assured has been advised both by the express terms of the policy and by the insurer through its agents that the amount of insurance will increase. To the non-expert mind that is "other insurance".

If some more esoteric definition of "other insurance" than that was intended by the insurer, it was up to the insurer to drive home such meaning in clear, unmistakable terms.

For years the insurance industry has invoked the doctrine of *uberrimae fidei* (*Stipcich v. Metropolitan Life Insurance Company* [1927] 277 U.S. 311 at 316) to saddle the assured with the highest duty to report to the insurance company anything which touches upon or affects the risk.

Failure of the assured to take an active role, to seek out and pass on to the insurer items pertaining to the risk, was always held to bar the assured from obtaining the benefits of his supposed bargain.

Modern developments in the law of insurance have established, however, that the doctrine of *uberrimae fidei* is a two-way street: If there is something about the proposed contract which would place the assured in the peril of non-coverage, there is an affirmative obligation on the insurer to speak out in no uncertain terms that will warn the assured of the peril of non-coverage.

In this case the defendant has claimed a limitation on its liability for loss of appliances kept at the new location.

The inquiry under current doctrines is whether there has been “an *understanding consent* of the consumer to any limitation of liability”, as stated in *Steven v. Fidelity & Casualty Company* (1962), 58 C.2d 862 at 883.

In *Gray v. Zurich Insurance Company* (1966), 65 C.2d 263, the Supreme Court of California stated: “We test the meaning of the policy according to the assured’s reasonable expectation of coverage” (p. 267).

The extended contacts between the plaintiffs and the defendant’s agents at a meeting held for the purpose of solving the plaintiffs’ insurance problems, render singularly pertinent a passage from *Steven* quoted in *Gray* (65 C.2d 263 at 271):

“If [the insurer] deals with the public upon a mass basis the notice of non-coverage of the policy, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain and clear.”

If there is an “ambiguity” in documents used by the insurer or oral representations made by the insurer’s agents, the insurer and not the insured must take the consequences.

The insurance cases involving the principle are discussed in an exhaustive article by Mr. Justice Matthew Tobriner and Joseph R. Grodin, Esq. in 55 C.L.R. 1247 at 1273 et seq., “The Individual and the Public Service Enterprise in the New Industrial State”.

Whether the representations are oral or written or both can make no difference: The cases hold there is an affirmative duty on the part of the insurer to bring home to the attention of the insured the circumstances in which he is to be denied the coverage he has been led to believe he was getting.

Again, the cases cited under point 1, *supra*, hold that oral representations by an agent on the subject of coverage conclude the insurer just as completely as written representations.

Finally, it will not do to argue that “silence cannot result in an estoppel”—as urged by the defendant at the trial of the action—because under existing law the duty of an insurance company toward its assured cannot be discharged by silence.

We would not be in Court today if Hoffman had said to Cordeiro: "I have authority to insure your inventory in the new store for only \$25,000; that may be insufficient for your operation; you had best get additional insurance somewhere else."

We turn now to additional propositions of law briefly touched upon before but which we now state separately for emphasis.

3. THE FAILURE OF THE PLAINTIFFS TO READ THE ENDORSEMENT TO THE INSURANCE POLICY CANNOT BE MADE A PREDICATE OF THE DEFENDANT'S CLAIM OF NO COVERAGE.

The trial court found (CT 84:26-31) that the policy was "delivered to plaintiffs" and that "neither plaintiff ever read the endorsement prior" to the fire loss which destroyed their inventory of appliances at the new location.

That finding will not sustain a holding of non-coverage.

As stated in 27 Cal.Jur.2d 688, Insurance § 200:

"Ordinarily, it is presumed that persons are familiar with the terms of written contracts to which they are parties, and in the absence of fraud they are justly bound by the provisions thereof. But it is well known that a comparatively small number of insurance policyholders read a policy in its entirety. Ordinarily, the policyholder makes little more than a superficial ex-

amination at the time the policy is issued. Hence the presumption is not strictly applied to insurance policies. For example, when a person applies for insurance giving him a particular coverage and the insurer agrees to write the policy so as to give that coverage, the insured is entitled to rely thereon, and his failure to read the policy will not relieve the insurer or its agent of the duty to write it as requested."

In *National Automobile and Casualty Insurance Company v. Industrial Accident Commission* (1949), 34 C.2d 20, the court stated (p. 26):

"The rule is settled in this state 'that the mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake.' (*Payne v. California Union Fire Ins. Co.*, 129 Cal.App. 582, 586 [19 P. 2d 40].) (See, also, *Golden Gate Motor T. Co. v. Great American Indem. Co.*, 6 Cal.2d 439 [58 P.2d 374]; *Hercules Gasoline Co. v. Security Ins. Co.*, 122 Cal.App. 499 [10 P.2d 128]; *California Packing Corp. v. Larsen*, 187 Cal. 610, 614 [203 P. 102]; *Los Angeles & Redondo R. Co. v. New Liverpool S. Co.*, 150 Cal. 21 [87 P. 1029]; *Travelli v. Bowman*, 150 Cal. 587 [89 P. 347]; *Sullivan v. Moorhead*, 99 Cal. 157 [33 P. 796]; *S. E. Slade Lbr. Co. v. National Surety Co.*, 128 Cal.App. 419 [17 P.2d 775]; *Cantlay v. Olds & Stoller Inter-Exch.*, 119 Cal.App. 605 [7 P.2d 395]; 22 Cal.Jur. 726.)"

To the same effect see *Modica v. Hartford, etc.* (1965) 236 C.A.2d 588 at 596, *Maier Brewing Company v. Pacific National Fire Insurance Company*

(1963) 218 C.A.2d 869 at 876 and *Laing v. Occidental Life Insurance Company* (1966) 244 C.A.2d 811 at 818-819.

4. WHERE NEGOTIATIONS BETWEEN THE ASSURED AND THE AGENT HAVE, IN THE LIGHT OF ALL THE EVIDENCE, LED THE INSURED TO BELIEVE THAT HE WAS COVERED FOR A PERIL WHICH IS TECHNICALLY EXCLUDED IN THE POLICY OR ENDORSEMENT AS WRITTEN, THE POLICY OR ENDORSEMENT WILL BE REFORMED TO EXPRESS THE "OBJECTIVE" INTENT OF THE PARTIES IN SUCH A MANNER AS TO PROVIDE THE COVERAGE THE ASSURED HAD A REASONABLE EXPECTATION OF RECEIVING.

We have discussed above several of the *estoppel* cases and note that the same principles entitle the insured to *reformation*.

In *estoppel* the policy is not changed; the insurer is merely denied the right to stand on an exception or term or limitation as written into the contract; in *reformation* the contract is rewritten to express the intent of the parties as "measured by the objective standard". *Maier Brewing Co. v. Pac. Nat. Fire Ins. Co.* (1963) 218 C.A.2d 869 at 874.

It will not do to argue that the defendant's—or Hoffman's—*subjective* intent was controlling. Subjectively, Hoffman (so he said at the trial) did not intend to afford coverage for any amount in excess of \$25,000. If matters of coverage were to be determined by the subjective intent of one of the parties there would be few cases where *reformation* is allowed.

The meeting of Cordeiro, Hoffman and Miller at Los Banos in April 1964 was not held for fun. It had a serious purpose. As stated in California Civil Code

3400, contained in the article on reformation, “It must be presumed that all of the parties . . . intended to make an equitable and conscientious agreement”.

It is obvious that Cordeiro—according to his testimony and according to all inferences that can be drawn from any of the evidence in the record—turned to Miller who turned to Hoffman for help in solving plaintiffs’ insurance problem.

The trial court found (CT 84:22-24) that Cordeiro “never specifically requested insurance in any greater amount at the new location than \$25,000”. It will not do to construe that as a finding that Cordeiro requested coverage in the amount of \$25,000 because Cordeiro never requested insurance in any specific amount at all. He wanted protection for his business and turned to the insurance industry for expert help.

Judged by the *objective* standards by which negotiations of this nature must be weighed, Cordeiro had every reason to think he was covered. He had done his best to show defendant’s agents what his problem was; if they didn’t know how to cover it, no one did; they had sold him a form of insurance—“the best possible coverage”—without pointing out to him the significance of the coverage limitations as understood by the experts.

Our case as developed by the evidence is strikingly similar to *Modica v. Hartford, etc.* (1965) 236 C.A.2d 588, in which reformation was allowed.

In the *Modica* case the insured only requested of the insurer’s agent “cover me for business” (236 C.A.2d

592); agents for the insurer told him that “you have good coverage”. The agent had familiarized himself with the assured’s problem and told him “I will see that you are covered”, and “You are covered” (236 C.A.2d 592) and that “he had nothing to worry about” (*idem* 593). The court noted (236 C.A.2d 593) that the insured “did not specifically instruct” the insurer’s agents “to write property damage insurance for him” (Compare with finding VIII, CT 84:22-24).

The insurer in *Modica* issued a policy which covered *liability for bodily injury* and gave *protection for loss by fire* but provided *no coverage for liability for property damage*.

Fire broke out in the premises leased by the assured, damaging the freehold and the property of adjoining tenants. The landlord and the adjoining tenants sued the assured, who brought action to have his policy reformed so as to provide suitable protection for property damage liability.

The court reformed the policy, adding property damage liability coverage with adequate limits. In affirming judgment for the assured, the appellate court stated: “An insurance policy may be reformed to show the premises intended to be covered” and “the amount payable”, and that the amount payable, even though never discussed, would be fixed at what “it would be reasonable to say in the circumstances” (*idem* 596).

In the *Maier* case, *supra*, agents for the defendant insurer informed the assured that it was getting cov-

erage "as broad or broader" than it had previously had. A policy was issued—and never read by the assured—which omitted from the description of the insured premises an area on which was stored property worth \$318,000, which was destroyed by fire. The insured sought to have the insurance contract reformed to include the omitted premises. The insurer defended on the ground that there had been no "meeting of the minds" because neither the insurer nor its agents "had the property in mind prior to the fire" (218 C.A.2d 869 at 874).

In affirming a judgment decreeing reformation to include the omitted area the appellate court said: "Courts are not interested in the subjective intent of the parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestation of consent . . . Mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake."

We submit that, judged by the *objective* formula requirement, the plaintiffs as reasonable men had a right to believe they were adequately covered, and were entitled to reformation, whether the limits were in a fixed amount, as claimed by the defendant, or in an amount for which they were charged and which varied, up or down, in accordance with report of inventory.

5. A LIMITATION IN AN INSURANCE POLICY DENYING COVERAGE WHERE A REPORTED INVENTORY EXCEEDS A PRESCRIBED LIMIT OF COVERAGE WILL BE IGNORED AS CONTRARY TO PUBLIC POLICY WHERE THE EXPRESS TERMS OF THE POLICY MEASURE THE AMOUNT OF PREMIUM BY THE AMOUNT OF INVENTORY REPORTED EVEN THOUGH SUCH INVENTORY EXCEEDS THE PURPORTED LIMITS.

As we have pointed out in the statement of facts, the form of policy issued by the defendants in this matter requires the assured to submit on forms furnished by the insurer his monthly inventory. The value of the inventory as so reported determines the premium. By the express terms of the policy the premium is exacted even though the amount of reported inventory *exceeds* the purported limits of the policy.

We submit that to charge the assured for coverage under the terms of one paragraph of the policy and to deny him that coverage under the terms of another paragraph of the policy is contrary to public policy and that the limitation of coverage will fall.

To paraphrase Judge Harrison in *Wallace, et al. v. World Fire and Marine Insurance Company* (D. Ct. Calif. 1947) 70 F. Supp. 193, affirmed (C.C.A. 9th, 1948) 166 Fed.2d 571, we suggest that an insurance company cannot “blow hot” when the figures are used to compute premiums and “blow cold” when they are relied upon to compute the company’s liability.

The converse of the proposition was involved in the cited case: The assured wished to use his reported figures—which were low—in computing the premium

and to use a higher set of figures in computing liability. Judge Harrison stated:

“They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied upon to compute the company’s liability.”

Payment of the premium and its retention by the insurer who (as in this case) was on notice of the facts, has always signaled to the insured that it was covered. *Ohran v. Nat’l. Automobile Ins. Co.* (1947) 82 C.A.2d 636 at 646. To allow the insurer to collect premiums for coverage not provided not only shocks the conscience but runs counter to the requirement that an insurance company must in all its dealings with its insured be fair and equitable. See the cases cited under point 2, *supra*.

-
6. WHERE, AS HERE, THE BASIS FOR THE TRIAL COURT’S DECISION CANNOT BE ASCERTAINED FROM THE FINDINGS, THE JUDGMENT SHOULD BE REVERSED.

Why did the trial judge find against the plaintiffs?

He found that Hoffman told the plaintiffs that there was a \$25,000 limit on the coverage. Was that the only duty the defendant owed?

There was, of course, no finding that the plaintiffs heard Hoffman tell them that or that they understood what he meant by that or that \$25,000 was any more than an initial or provisional limit which would be automatically increased as the report of inventory was received.

There was no finding that Hoffman advised plaintiffs that in the event they moved into the new location appliances in excess of that value coverage would not automatically follow, as they had been led to believe it would when they reported their increase in inventory.

There is a finding that the plaintiffs did not read the policy. Is that why they were denied relief? We have shown that the failure to read a policy under the circumstances was without legal significance and the fact that the court made a finding on the point suggests that the court may have been of the opinion that the failure of the plaintiffs to read the policy barred them from recovery.

Did the trial court believe the plaintiffs were aware of the limit of \$25,000? There is no finding that they either knew or should have known what the limit was.

Did the trial court feel the insurer discharged its duties to the assured, or that it had no affirmative duties, as argued by defendant?

It was and is our position that estoppel was established as a matter of law under all the circumstances. Again, specifically, the knowledge and representations of defendant's agents, coupled with the lack of insurance expertise or knowledge on the part of Cordeiro of any limitations in the policy or on the authority of defendant's agents and the "objective" appearance of coverage inherent in the circumstances and in the defendant's form of policy as well as its form of report, support this position.

VI. CONCLUSION

It is respectfully submitted that the judgment should be reversed and judgment entered for the plaintiffs in the amount of the prayer, or, alternatively, that the matter may be retried in the light of the principles above discussed.

Dated, San Francisco, California,
April 26, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. S. CATHCART,
Attorney for Appellants.

No. 21,840

United States Court of Appeals
For the Ninth Circuit

SEP 10 1968

EDWIN CORDEIRO and EDMUND LEWIS, in-
dividually and doing business as Cor-
deiro and Lewis Appliances,

Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY,
a corporation,

Appellee.

Appeal from the Judgment of the United States District Court,
Eastern District of California at
Fresno, California
Honorable M. D. Crocker, Judge

APPELLEE'S REPLY BRIEF

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FILED

SEP 10 1968

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No. 21,840

**United States Court of Appeals
For the Ninth Circuit**

EDWIN CORDEIRO and EDMUND LEWIS, in-
dividually and doing business as Cor-
deiro and Lewis Appliances,

Appellants,

vs.

AMERICAN HOME ASSURANCE COMPANY,
a corporation,

Appellee.

Appeal from the Judgment of the United States District Court,
Eastern District of California at
Fresno, California

Honorable M. D. Crocker, Judge

APPELLEE'S REPLY BRIEF

I. JURISDICTION OF THE UNITED STATES COURT OF APPEALS.

Appellee is in accord with the statement of jurisdiction as contained in the opening brief.

II. STATEMENT OF THE CASE.

Appellee is in accord with the statement of the case as is contained in the opening brief, except that a more accurate statement of the situation would be that an endorsement was added to the pre-existing policy. This new endorsement covered property at 1105 Sixth Street, Los Banos, with a limit of liability thereon of \$25,000.00. Plaintiffs seek in this action to reform this endorsement to raise the limit of liability at 1105 Sixth Street from \$25,000.00 to \$50,000.00.

III. STATEMENT OF FACTS.

Appellee disagrees with the statement of the facts set forth in the opening brief. In view of the fact that the statement therein is argumentative in some particulars, and incomplete in others, appellee undertakes herein to restate the facts, noting where there are any material conflicts of evidence.

Plaintiffs Edwin Cordeiro and Edmund Lewis were the operators of a mercantile establishment known as "The Firestone Store" at 1032 Sixth Street, Los Banos, California. This was a franchise operation by the Firestone Company. (RT 42:12-18.)

The stock of goods consisted of home appliances, such as refrigerators, freezers, washing machines, dryers,

“and so on; also a TV line, which includes TVs and Stereos and at that time no color and then we had a complete line of toys, housewares—now, housewares includes complete housewares, pots and pans and small appliances; we had a record department and giftware.”

(RT 41:18-22.)

Harry Miller was insurer's soliciting agent in Los Banos. (Hereafter, appellee will be referred to as Insurer for purposes of convenience and clarity.) Mr. Miller was empowered to solicit and receive proposals for insurance of the classes designated in his agency agreement. (Plaintiffs' Exhibits 1 and 3.) The Insurer also stood ready to render to Mr. Miller such special assistance as he might need. (Plaintiffs' Exhibit 2.)

In April, 1963, insurer issued to appellants the original policy of insurance. (Plaintiffs' Exhibit 6.) Exhibit 6 as now in the record includes the subsequent endorsement which plaintiffs seek to reform. This came about as the result of Mr. Miller asking insurer to send its special agent or field man to the scene, and working out the details of the insurance. (RT 176:17-20.) This special agent was Mr. Marvin Hoffman, also known as Mr. Dave Hoffman. As a result of Mr. Hoffman's negotiations with Mr. Cordeiro a reporting form policy was issued covering the various liabilities and exposures involved with the operation of the Firestone Store. (Plaintiffs' Exhibit 6, RT 138:21-23.)

This contract is a “reporting form” of contract. It provides in part:

“13. Full Reporting. In the event of loss or damage to the property insured hereunder, the liability of this Company shall in no event exceed a greater proportion of such loss or damage than the total value last reported by the insured prior to such loss or damage bears to the actual values at risk hereunder as of the date for which such report was made. *Any loss in excess of the limits of liability stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported.*” (Emphasis added.)

The limit of liability stated in the policy covering the Firestone Store (referred to in the transcript from time to time as “the old location”) on stock and equipment was \$50,000.00. This limit was established as a result of the discussion with Mr. Cordeiro, who, presumptively, had the best knowledge of the amount of goods he would have exposed to loss by fire and the other perils insured against. Amounts of insurance and exposures as to other interests of the insureds were likewise determined.

“Q. It states the words, ‘Limit, 50,000’; what does that mean, sir?

A. That means the limit of the stock and equipment.

Q. Do you mean the total value of stock and equipment?

A. The limit of liability.

Q. And how did you determine that or who told you that, sir?

A. The insured.

Q. It states 9,000 equip. and tenant’s improvements; what does that mean, sir?

A. That means his equipment and tenant's improvements.

Q. What does the 9,000 mean?

A. The 9,000 is the average value.

Q. \$9,000?

A. \$9,000.

Q. It states 30,000 average stock; what does that mean, sir?

A. That means his average inventory was \$30,000 for the past 12 months.

Q. And how did you find that out?

A. From the insured.

Q. It states 1500 in transit open (1½ ton pick-up); what does that mean, sir?

A. That provides a limit of \$1500, amount of insurance, for any one catastrophe during transit on this particular vehicle or any other vehicle he may acquire.

Q. How did you find that out, sir?

A. From the insured."

(RT 178:19-179:22.)

* * * *

"Q. What was the discussion?

A. The limit of liability that was established.

Q. And did you tell them what limit of liability had been established?

A. No; we don't do that. It's up to the insured to establish the limit of liability."

(RT 140:16-21.)

There is no testimony of plaintiffs that they did not know of this fifty thousand dollar limit of liability for stock and equipment at the Firestone Store. The best they could say was that Mr. Hoffman "never stated any limitations at all to me". (RT 44:19-20.)

In April, 1964, Mr. Hoffman was again on the scene on behalf of Insurer. Plaintiffs had arranged to purchase a furniture store from a Mr. Enos who was retiring from that business. This store was across the street from the old location, and about a half a block away. (RT 83:16.)

As a result of the second visit of Mr. Hoffman, an endorsement was added to the insurance policy, providing coverage for stock and equipment at the new location, with a limit of liability of \$25,000.00. (Plaintiffs' Exhibit 6.)

It is plaintiffs' purpose in this action to reform that endorsement to raise the limit of liability to \$50,000.00. It is therefore appropriate to devote the remainder of this portion of the brief to the evidence presented, as to the circumstances out of which this endorsement with the \$25,000.00 limit was agreed to by the plaintiffs and the insurer.

At the time of the negotiations for the insurance on the new location, it was the stated intention of Mr. Cordeiro to operate stores at both locations. When the subject of insurance on the new location was first raised by Mr. Cordeiro to Mr. Miller, Mr. Cordeiro stated:

"A. At our store when I called Harry. The first time I called Harry we were in the process of buying the store and at that time I talked about the insurance with Mr. Enos that we would have our own and I told Harry that we were going to buy the furniture store but that we were going to combine the furniture and appliances together and operate the store and *that I was to move my office and everything to the furniture*

store and then we would keep the other store as-is, with giftware, records and housewares business with the two women. That is the extent of the conversation at that time.

Q. What did he say?

A. He said he would get Mr. Dave Hoffman down here to package the deal for us.

Q. Did Mr. Dave Hoffman come down?

A. Yes, sir."

(RT 53:3-20; emphasis by counsel.)

It is noteworthy that the very first communication by plaintiffs about the insurance on the new location reflected (1) that plaintiff Cordeiro was aware of the insurance problems (RT 53:6) and also (2) it was his announced intention to retain the *status quo* on the old location. (RT 53:12.)

The negotiations between plaintiffs as insured, and appellee, as insurer, which resulted in the issue of the endorsement with the \$25,000.00 limit which is now in dispute, were handled entirely by Mr. Cordeiro and Mr. Hoffman. Mr. Miller did not participate on behalf of the insurer. Mr. Miller testified:

"Q. So far as the negotiations for the insurance were concerned, you left that in the hands of Mr. Hoffman, did you not? With respect to the new location, of course.

A. Both locations.

Q. Well, I'm asking you with respect to the new location. You left that to Mr. Hoffman?

A. I left what?

Q. The negotiations between Mr. Lewis and Mr. Cordeiro on the one hand and Mr. Hoffman and the company on the other, you left that aspect of the matter to be handled by or dominated by Mr. Hoffman, didn't you?

[Objections and Rulings.]

The Witness: Now, are we talking about writing down all the information, listing it, taking the area of the building for the liability coverage?

Q. The matter——

A. The matter of the inventory?

Q. The matter of the inventory, the asking of the questions on the one hand and the answering them on the other so that an agreement, a meeting of the minds could be had between insured and insurer?

[Objections and ruling permitting answer.]

The Witness: Well, naturally there was discussion and I left most of it up to Mr. Hoffman, because he is a direct representative of the company and there's information that he needed."

(RT 34:6-35:15.)

So far as Mr. Miller's observations as to the physical inventory situation at the new location, he merely observed some "white goods", refrigerators and washers, in the new location.

"Q. How about the white goods?

A. Oh, there were several of them. As far as counting them individually, I didn't take any inventory to that effect."

(RT 37:13-15.)

And what could be more normal in the inventory of a furniture store than the display of several gleaming home appliances?

However, this observation does not impute any knowledge to Mr. Miller concerning the expected total of the furniture inventory, since he had already been

expressly informed by Mr. Cordeiro that the insured intended to retain the old location where the appliances had been sold, and continue to do business there.

“Q. You were aware at that time, at the time you made these observations, were you not, that it was the intention of Mr. Cordeiro and Mr. Lewis to maintain or retain the old location and sell from there, too?

A. They were in the process of possibly weeding that store out eventually; they wouldn't have need of it.

Q. Now, Mr. Miller, is it your testimony that at that time Mr. Cordeiro and Mr. Lewis were uncertain as to whether or not they were going to keep the old location?

A. I wouldn't say they were uncertain, no, but this was thought of eventually, maybe when their lease ran out, maybe that they would eventually just abandon that location.

Q. Well, their immediate plans were to maintain or retain the old location, were they not?

A. That is correct; yes.

Q. Now, did Mr. Enos, when he had the furniture store——. Let me withdraw that.

You were aware that Mr. Cordeiro and Mr. Lewis purchased the remaining inventory of Mr. Enos?

A. That is correct.

Q. Did Mr. Enos have any floor models or demonstration refrigerators or stereos or TVs in his store?

A. Mr. Enos didn't handle appliances. He could have had possibly——

Mr. Cathcart: Just a moment. We will object to what Mr. Enos could have had.

The Witness: *I don't know what he had*, because I didn't have the place insured to begin with.

By Mr. Downs:

Q. Well, do you know that Mr. Enos had televisions?

A. He had furniture.

Q. He had television sets, too, didn't he, sir?

A. I don't know."

(RT 38:6-39:15.) (Emphasis by counsel.)

Since Mr. Miller didn't know what Mr. Enos' inventory was, or of what it consisted since he had not participated in the insurance on behalf of Mr. Enos, Mr. Miller, and the Insurer, could hardly be charged with knowledge of a future inventory by plaintiffs, based on this single observation.

The limit of liability of \$25,000.00 on the endorsement which was issued, was established through the representations of Mr. Cordeiro to Mr. Hoffman. It is of vital significance to observe that at no time did Mr. Cordeiro ever state to Mr. Hoffman that he, Mr. Cordeiro, wanted a \$50,000.00 limit of liability on the new location. What Mr. Cordeiro did do was tell Mr. Hoffman what the inventory was on the new location, and the limit of liability was set accordingly at \$25,000.00, the trial Court finding as a fact that Mr. Cordeiro was so informed. (CT 81.)

Mr. Cordeiro testified (emphasis by counsel):

"Q. All right. Now, will you tell me the conversation you had with Mr. Hoffman or the conversation with Mr. Miller when Mr. Hoffman was present on the subject of insurance?

A. At that time, we stated we wanted the same insurance again; in other words, we were talking about the block form, and they said they would give us the same coverage. In fact, I told them that day we had the inventory complete and

the equipment complete, because Mr. Enos and I had just finished the inventory and we had a complete form that we handed to Mr. Miller and Mr. Hoffman got it that day, in fact. It was the inventory of the new place now, only; we were talking about the furniture only and the equipment I bought from Mr. Enos.

Also, that day I explained to them that we were moving——

Q. Explained to whom?

A. Mr. Hoffman and Mr. Miller.

Q. Yes.

A. ——that we were moving. In fact I showed them the TVs and the stereos, how we displayed them with the furniture and how we tied in the furniture and the appliance together and we were going to run one operation there and *we would be moving* everything over—in fact, that day we were.”

(RT 54:13-55:12.)

Two observations should be made as to this testimony. First plaintiff Cordeiro states he did deliver the inventory to Mr. Hoffman. (Verified by Mr. Hoffman, RT 186:6-9.) Secondly, the matter of moving over appliances was a prospective operation—one to be done in the future. Television and stereo sets would, to the normal person be an item of furniture inventory. As to “white goods”, only 15 such items were on hand (RT 56:9-15), hardly enough to alert a person that the yet unperformed and unstated intent of Mr. Cordeiro was to change the furniture store into an appliance store.

Upon cross-examination, Mr. Cordeiro stated again that he never advised Mr. Hoffman that he desired a limit of liability of \$50,000.00 at the new location. In-

deed, he stated that he never asked Hoffman at all for any specific amount of insurance in dollars. What he did do was supply the inventory figures to Hoffman, which inventory figures were not augmented by any so-called "white goods" plaintiffs had already moved, or may have intended to move, into the store at the new location. Said Mr. Cordeiro:

"Q. Now, what was it that you asked for with respect to the insurance on the new location; what did you tell Mr. Hoffman you wanted?

A. That we wanted the same coverage we had, sir.

Q. And by 'same coverage', you mean you wanted the same kind of reporting form policy?

A. Right, sir.

Q. Now, you never discussed the matter of dollars in amount of insurance with Mr. Hoffman at that time, did you?

A. No, sir.

Q. And you never specified any outside limits of insurance that you wanted?

A. No, sir.

Q. Did Mr. Hoffman ask you what the inventory was?

A. Of the place we were buying?

Q. Of the new location?

A. Yes, sir; we gave it to him.

Q. And did you tell him approximately how much it was?

A. It was approximately \$17,000 we were buying.

Q. And how about the equipment?

A. The equipment was probably four—three or four thousand in equipment.

Q. And did Mr. Hoffman then say to you that \$25,000 was the limit, that would appear to be adequate?

A. No, sir.

Q. No such declaration was made?

A. No, sir.

Q. You did tell Mr. Hoffman it was your intention to retain the old store?

A. Yes, sir.

Q. Then with respect to the limit or the amount of fire insurance you neither said to Mr. Hoffman what the outside limit was supposed to be and he never said to you what it was going to be?"

(RT 74:6-75:16.)

An answer was given to the last question, was stricken by the trial judge upon motion, and then the following appears in the transcript:

(Question read by the reporter as follows):

"Q. Then with respect to the limit of the amount of fire insurance you neither said to Mr. Hoffman what the outside limit was supposed to be and he never said to you what it was going to be?"

The Witness: Specific amount of money, sir?

Mr. Downs: Right.

The Witness: No, sir.

* * * * *

Q. Did Mr. Hoffman ever say to you that you were going to be covered to the extent of \$50,000 for fire insurance on stock and equipment?

A. No, sir."

(RT 76:3-11, 20-23.)

Thus, it appears that not only did Mr. Cordeiro fail to convey to Mr. Hoffman that he wanted a limit of liability of \$50,000.00 at the new location, but also, Mr. Cordeiro admits that Mr. Hoffman never told

him that he would have a limit of liability of \$50,000.00.

Mr. Hoffman's testimony, when considered with that of Mr. Cordeiro, makes it very clear that so far as the limit of liability of \$25,000.00 on the new location was concerned, the only information imparted to Mr. Hoffman by the insured was that the furniture store was to be a new location, and that the inventory therein was about \$16,000.00, and the fixtures and tenants' improvements were about \$3,000.00.

Mr. Hoffman has no recollection of seeing appliances in the new location. (RT 145:21-23.) Common experience demonstrates that there is no reason why he should have a specific recollection of a particular item of stock which is common to all furniture stores.

As to the future intentions of Mr. Cordeiro concerning appliances, the intelligence imparted to Mr. Hoffman by Mr. Cordeiro was only that Mr. Cordeiro intended to move in a few appliances for "display purposes".

"Q. Now, do you recall any mention at all having been made of appliances on that day?

A. Some mention was made that a few items would be moved in. I——

Q. Who made that mention?

Mr. Downs: Let him finish his answer.

The Witness: I don't recall.

By Mr. Cathcart:

Q. Finish your answer, please?

A. There was a casual remark, as I understand it, that they would have some in there on display, for sale and so on.

Q. That they would have some appliances in there on display for sale?

A. Just to be shown, as I understood it: that they would be there *for display purposes only*, as I got it."

(RT 146:12-25, 147:1-5.) (Emphasis by counsel.)

And what could be more natural to such an operation? With the appliance store in the same block, a few display models in the furniture store would serve the purpose of a combined furniture and appliance operation which Mr. Cordeiro mentioned in his testimony.

As the function of Mr. Hoffman was to determine the amount of goods likely to be at risk, so that the limit of liability could be agreed upon by insurer and insured, Mr. Hoffman asked Mr. Cordeiro the only logical questions. He testified:

"Q. All right. Did someone tell you how much furniture they were acquiring at that new location?

A. Yes.

Q. Who did?

A. Mr. Cordeiro.

Q. How much did he tell you?

A. On furniture stock, in inventory?

Q. Yes.

A. He said there was \$16,000.

Q. Did he say anything in addition to \$16,000?

A. Not insofar as the stock is concerned.

Q. Well, did he say anything about the equipment or tenant's improvements?

A. Yes.

Q. And what did he say he was acquiring in the way of equipment and tenant's improvements?

A. That that was part of the deal in purchasing the furniture store, that there was a certain amount of equipment in there.

Q. Well, did he tell you how much, the value?

A. \$3,000.

Q. He said \$3,000 in equipment and tenant's improvements?"

(RT 150:15-151:12.)

This is entirely consistent with Mr. Cordeiro's previous testimony.

The most credible evidence as to what transpired between Mr. Hoffman and Mr. Cordeiro in April, 1964 is the field notes and memoranda of Mr. Hoffman. These are defendant insurer's Exhibits E, F and H, and are described in the Reporter's Transcript, pages 184 through 194. These were prepared contemporaneously with the events involved. More important, they were prepared at a time before a dispute arose. Defendant's Exhibit E describes the results of the conference with Mr. Cordeiro. It is to be noted that it verifies what Mr. Hoffman was told about the amount of the inventory and the value of the equipment. Defendant's Exhibit H, Mr. Hoffman's summary of the field notes on the new location, describes the new location as "retail furniture store". Had appliances been pointed out, emphasized, stressed, or otherwise brought to the attention of Mr. Hoffman, there would have been notes to this effect. The notes evidence what the transaction was—that the parties agreed upon a \$25,000.00 limit on the new location, and Mr. Cordeiro was so informed.

"Q. Now, with respect to your discussion with Mr. Cordeiro at the time that you arranged for the insurance on the second location, did Mr. Cordeiro——. Withdraw that.

Did you tell Mr. Cordeiro that the limits were going to be \$25,000?

A. Yes.

Q. And did he disagree with you as to that limit?

A. No.

Q. Did he ever ask for any more insurance than \$25,000 on the second location?

A. No, sir."

(RT 158:10-20.)

The presence or absence of a few display appliances does not affect the credibility of Mr. Hoffman, or the Defendant's Exhibits E, F, and H. Nor does it support the gratuitous assertion in the footnote on page 14 of Appellant's Brief that "Defendant's Exhibit E, presumably written at a time when Hoffman had forgotten that the appliances were being moved". It is simply that a few display appliances were not material considerations in the insurance asked for by plaintiff.

"Q. Mr. Hoffman, as an insurance man, would the fact that a few appliances were going to be moved into a furniture store change its character as a risk?

(Objection and ruling.)

The Witness: No, sir."

(RT 158:1-7.)

Appellants' Opening Brief, in Heading IV, Statement of Facts, contains other inaccuracies which must be corrected. On page 6, it is stated that the insured "was required by the new policy (Plaintiffs' Exhibit 6) to report to the insurance company on forms furnished by the company. . . ." This declaration is wholly untrue. There is nothing in Plaintiffs' Exhibit 6, the insurance policy, which requires that the

reports of values be made on company supplied forms. Further, Mr. Girdlestone testified the exact opposite was true:

“Q. Did this policy provide for reporting by the assured?

A. Yes.

Q. Was it the intention of the company that the assured should report on any particular form?

A. No, sir; it's not necessary. Some assureds even make reports on their own letterheads.”

(RT 96:12-18.)

Nor is it exactly in accord with the record that Mr. Hoffman “confirmed the insured was not advised as to the limits of the insurer's liability” as is stated at the bottom of page 6 and the top of page 7 of Appellants' brief. The facts are as reported in the transcript on page 141.

“Q. Well, you said a moment ago, as I understood you, that it was up to the assured to establish the limits of liability?

A. They establish the limit of liability and it is presented to us and we would say we would either accept a million dollar limit or we would tell them that we could handle, say, only \$100,000 of it.

Q. All right. And on this particular occasion did Mr. Cordeiro tell you any specific amount of insurance that he was going to establish as the limit of liability on this policy?

A. I don't recall that.”

(RT 141:1-12.)

And concerning the matter raised on page 12, and that Mr. Hoffman “neglected to inform himself as to how many or tell his employer, the defendant, that

any appliances were being moved," the true story is the remainder of the testimony on the transcript page cited (RT 157:10-20) in which Mr. Hoffman said he did learn a few items of appliances were being moved, and on RT 158, explains that the introduction of *only* a few items is not a material consideration in the matter of insurance. It being the duty of the insured, as is enlarged upon in the next section of this brief, to make the disclosures necessary to enable the contract of insurance to be made, the use of the word "neglect" with reference to the conduct of Mr. Hoffman is to import a sly inference of wrongdoing which neither the record nor the law justifies.

That Mr. Cordeiro never saw the endorsement which extended the coverage to the new location, as is stated on page 12, can hardly be relevant. He admits the original policy was delivered into his custody, and that "Probably it was put in the safe by Jennie" (RT 69:17-24), and that he did not read it. The fact is that he had no intention of ever reading any of the policies, or keeping track of the insurance. He elected to delegate that duty to others, but without informing them of such delegation.

"Q. Can you tell us why you didn't read it?

A. Well, sir, to be honest with you, I kind of left it up to Mr. Miller and Mr. Hoffman to take care of that part of it."

(RT 70:2-5.)

There is nothing in the record to show that Mr. Miller or Mr. Hoffman were ever informed by Mr. Cordeiro that he was charging them with this responsibility.

Appellants point out on page 13, as part of the factual statement, that defendant did not object to the form of the monthly reports of values submitted. Nowhere in the brief is there any authority pointing out a duty on the part of the insurer to object. As enlarged upon, *infra*, the basic reason for the reporting form of policy is to take out of the hands of the insurer, the power to determine the amount of premium, and to place it entirely within the hands of the insured. The insured is given complete freedom by this form of policy to report in any form, and in any amount of value. For the insurer to object is to deprive this vehicle of its utility to the insured.

There is no conflict at all upon the fact that had Mr. Cordeiro asked for a limit of liability of \$50,000.00 on the new location, that the insurance company would have rejected the proposal. As it was, because of the nature of the building and the exposures involved, the \$25,000.00 limit was written as a matter of accommodation only, not because the insurance company actually wanted to underwrite the particular risk. (RT 209-214.)

Probably the best factual summary which could be written in this matter is contained in the Memorandum and Order of the Trial Court. (CT 80, 81.) The facts simply are that as to the new location, the insurer agreed to be at risk to the extent of \$25,000.00, on the new location, so notified plaintiff insureds, who accepted the endorsement providing for the new insurance. There is neither foundation for mutual mistake, unilateral mistake, nor estoppel which would justify a reversal of the decision of the trial Court.

IV. ARGUMENT.

1. THERE IS ADEQUATE EVIDENCE TO SUPPORT THE FINDINGS OF THE TRIAL COURT.

This is an action to reform a written contract of insurance, to wit, the endorsement providing for coverage on stock and equipment of the insured at the new location, 1105 Sixth Street, Los Banos. The coverage had a \$25,000.00 limit. Plaintiffs seek to reform this limit to make it read \$50,000.00.

Plaintiffs proceed upon three theories of action. The first is that there was a mutual mistake in the making of the contract. The second that there was a unilateral mistake in its making, which mistake was known or suspected at the time of the making of the contract, by the defendant insurer. The third is upon a theory of estoppel.

The right to reform a written contract in California is governed entirely by statute, Section 3399 et seq. of the Civil Code.

“§3399. When, through fraud or a mutual mistake, or a mistake of one party, which the other *at the time* knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention . . .”

“§3400. For the purpose of revising a contract, it must be presumed that all of the parties thereto intended to make an equitable and conscientious agreement.”

“§3401. In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the in-

quiry what the language of the instrument was intended to be.”

Nature of the Remedy Sought by Plaintiffs.

The power of the Court to reform a written contract has been part of the law of California without special reference to §3399 et seq. of the Civil Code.

Stafford v. California Canning Peach Growers
(1938) 11 C. 2d 212, 78 P. 2d 1150.

To reform a written instrument, the conditions specified in the Code must be met.

“Reformation in case of mistake may be granted only where the case is brought within the provisions of Section 3399 of the Civil Code.”

Security First Nat. Bank v. Loftus (1933) 129
Cal. App. 650, 19 P. 2d 297, at 299.

Thus, for plaintiffs to prevail in this case, they are obliged to prove either (1) that both parties, plaintiff and defendant, intended that the new insurance for the new location was to be in the provisional amount of \$50,000.00; or (2) that plaintiffs were mistaken in the amount of insurance they thought they had, *and that at the time of the negotiations which culminated in the issue of the endorsement to cover the new location, that defendant knew or suspected plaintiff's error.* The other statutory ground for reformation, fraud, is not alleged in the complaint and is not an element in this case.

It is important to observe that none of the statutory grounds for reformation include estoppel. Save for the two Federal cases cited by Appellants, which are not applicable as is set forth in detail in Section 2, *infra*, there is no case authority in California

which will authorize a reformation of a written contract on grounds of estoppel. This being a diversity case, the rule of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) governs the applicable law.

To reform a written contract, a mere preponderance of the evidence is insufficient. The evidence must be clear and convincing. It must also be without material conflict.

“The rule that relief by way of reformation will not be granted unless mutual mistake be proven by clear and convincing evidence, and not by a mere preponderance, Restatement of Contracts, §511 [and other authorities cited] is a salutary one, operating to prevent the substitution of parole for written contracts upon loose and unsupported claims that the agreement was other than it appears as written.”

Day v. Firemans Fund Ins. Co. (1933, C.A. 5)
67 F. 2d 257, at 258.

This is likewise the law of California.

“In order to reform a written instrument the plaintiff must prove the mutual mistake by clear and convincing evidence.”

California Pacific Title Co. v. Moore (1964)
229 C.A. 2d 114, 40 Cal. Rptr. 61 at 63.

And it has been the California law since the days of Mr. Chief Justice Field.

“The evidence, it is true, must be clear and convincing, making out the mistake to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt.”

Lestrade v. Barth, 19 Cal. 660 at 675, quoted
with approval in

Girard v. Miller (1963) 214 C.A. 2d 266, 29
Cal. Rptr. 359, at 363.

The only conflict in the evidence in this case, if there is a material conflict at all, is whether Mr. Hoffman on behalf of the defendant insurer, told Mr. Cordeiro that the limit of liability on the new location was to be \$25,000.00. Mr. Hoffman says he did. (RT 158:10-20.) Mr. Cordeiro says he did not. (T 58:14-18.) Mr. Cordeiro does say absolutely that Mr. Hoffman did not tell him that he would be covered to the extent of \$50,000.00. (RT 76:20-23.) The trial court found as a fact that Mr. Hoffman did inform Mr. Cordeiro that the limit of liability on the new location was \$25,00.00. (CT 81; CT 84, Finding No. VII.)

Where a conflict in the evidence of this nature obtains, particularly in a reformation case, the trial court finding should be affirmed.

“In such situations [conflict of evidence] great reliance must be placed on the assessment of the conflicting evidence by the trier of fact, who is best situated to judge the credibility of the witnesses before him. We can only differ from his assessment if we determine that it was clearly erroneous and without support in the record.”

Unitec Corp. v. Beatty Safway Scaffold Co.
(C.A. 9, 1966) 358 F. 2d 470, at 474.

Appellee submits that there is adequate evidence in the record to support the findings.

2. THERE IS NO ESTOPPEL, EITHER IN LAW OR IN FACT.

This numbered section of Appellee's brief is intended to reply to Section 1, pages 16-19 of Appellants' Brief.

If the claimed estoppel is to be based upon a representation in the form of declarative conduct, Appellants' Brief is less than clear. On page 16 in two instances Appellants refer to estoppel on the insurer to deny that coverage existed for a particular "*peril* excluded from coverage." There is no issue of estoppel to deny coverage for particular perils in this case. The peril insured against was fire. A fire occurred. The question is whether there is evidence to estop the defendant from asserting the agreed upon limit of liability at the new location was \$25,000.00.

If the rule in the case of *Ivey v. United National Indemnity Co.* (C.A. 9, 1958) 259 F. 2d 205, supersedes the statute which defines the limits on the right to reformation, Appellants herein have not made the same factual showing which justified the result in the *Ivey* case. In Dr. Ivey's situation, Dr. Ivey as insured, was concerned about specific potential liabilities involved with his duck hunting property. There were two vital evidentiary elements in that case which warranted the reversal of the trial court decision. The first was the determination that in the application for insurance,

"the broker notified the company that appellant wanted both property damage and bodily injury liability coverage on the duck hunting property; and that he, the broker, understood from appellee that such coverage was provided by the policy, and that he had so informed the appellant." (*Ivey*, supra, at p. 206.) (Emphasis added.)

The second was a distinct and clear representation by the agent of the company that

"the policy provided the property damage coverage desired and so informed Dr. Ivey when the

policy was delivered.” (Ivey, supra, at p. 209.)
(Emphasis added.)

No such overwhelming evidence appears in this case. To the contrary, the testimony is that the insured did not specify a \$50,000.00 limit of liability; did not ask for a \$50,000.00 limit of liability; and was informed that the limit was \$25,000.00. (RT 158: 10-20.)

Nor does the factual predicate which justified the decision in *Beach v. United States Fidelity and Guaranty Company* (205 C.A. 2d 490, 23 Cal. Rptr. 73, 1962), relied upon by Appellants, exist in the case at bar. In that case, the agent had full knowledge imparted to him of the situation by the insured, and was affirmatively negligent in securing the required coverage. In fact, in the *Beach* case the insured was continuously concerned (compare Mr. Cordeiro's lack of concern herein) over the problem of coverage, and sought from the company an assurance that he was in fact covered. He was told by the company representative,

“. . . to quit worrying about it, that it was all taken care of, and that he (Thomas) was covered.”

Beach case, *supra*, at p. 75 of 23 Cal. Rptr.

The rule in the *Beach* case cannot be stretched to include a case where Mr. Cordeiro, as insured, is relying upon what he *assumes* Mr. Hoffman learned from observation alone, when in the face of that observation Mr. Cordeiro affirmatively represented that the old appliance store was going to continue to operate “as is” (RT 54:4-16) and also told Mr. Hoffman he was carrying only a \$16,000.00 inventory in the

new location, and where Mr. Cordeiro admits he was never told he would have \$50,000.00 on the new location (RT 76:20-23).

Nor, in the matter now before the court, are there any facts which would support invocation of the rule of *Owen v. American Home Assurance Company* (USDC, ND, Cal., 1957, Judge Halbert) 153 F.S. 928, cited by Appellants. The rule there is that an estoppel may arise if the agent gives a "misleading, incorrect or incomplete answer, without qualification . . . to a *specific question* by a prospective insured concerning coverage . . ." (*Owen, supra*, at 930.) [Emphasis by counsel.] There is absolutely no evidence in the present matter to support such a finding.

The case of *Tomerlin v. Canadian Indemnity Co.*, 61 Cal. 2d 638 (1964) 39 Cal. Rptr. 731, has to do only with the conduct of the company's counsel and the insured's counsel after the loss, concerning the duty to defend. It is not a case wherein *coverage is created by estoppel*.

The recital of facts in the remainder of the cases cited in Section V. 1. of the Appellants' Brief are equally inapplicable to support the invocation of any rule of law whereby coverage in the amount of \$50,000.00 could be created by estoppel.

3. THERE IS INSUFFICIENT EVIDENCE UNDER THE LAW TO FIND AN ESTOPPEL IN ANY EVENT.

In the *Granco Steel* case cited by Appellants, the elements of an estoppel in an insurance case are set forth.

"Generally speaking, four elements must be present in order to apply the doctrine of equitable

estoppel; (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.’”

Granco Steel, Inc. v. Workmen's Compensation Appeals Board (1968) 68 Adv. Cal. 191, 436 P. 2d 287, 65 Cal. Rptr. 287 at 295.

Was defendant insurer apprised of the true facts, so as to find the first necessary element of an estoppel? The trial Court found no estoppel. The record adequately supports this finding.

At the risk of repetition, all that the insurance company representatives did know about the new location is what they observed, and what Mr. Cordeiro told Mr. Hoffman. The old store was the appliance store. Mr. Cordeiro stated to Mr. Miller he intended to retain that operation “as is.” Mr. Hoffman asked for and received the dollar sum of the inventory of the new store as \$16,000.00. (RT 74:20-25; 75:1.) Mr. Hoffman observed only what appeared to be “display models” of appliances in the new store. (RT 146:12-25, 147:1-5.) Mr. Cordeiro never discussed a specific dollar limit in amount of insurance. (RT 74:13-16.) Mr. Cordeiro never specified any upper limit of insurance he wanted. (RT 74:17-19.) Mr. Cordeiro told Mr. Hoffman he intended to retain the old store. (RT 75:10-12.) The presence of a few appliances in the new location, which presence was obviously for display as distinct from inventory, is not notice to the insurance

company of any material change in the risk as a furniture store. (RT 158:1-7.)

The record demonstrates that Appellee did not have knowledge of the facts sufficient to overturn the trial Court's finding that there was no estoppel.

In any event, the knowledge which insurer did have, has to be considered in the light of the law as to the duty of the insured, himself, to apprise himself of the terms and conditions of the insurance. Plaintiffs' right to reform the contract, whether predicated upon estoppel or mistake, is a right which is conditioned by their own diligence. The mere fact that plaintiffs, as insureds, were (allegedly) not aware of any limitations on the coverage does not, in and of itself, justify a reformation of the contract. See, e.g., *McCormick v. Orient Insurance Company*, 86 Cal. 260, 24 Pac. 1003 (1890). In that case, the Court held that the insured's ignorance of a condition of the policy requiring sole and unconditional ownership of the insured property did not justify reformation to delete that clause.

"The law required of appellee but reasonable diligence under the circumstances [when it comes to the duty of the insured to read his policy and be aware of its terms . . .]."

Connecticut Fire Ins. Co. v. Oakley etc. Building and Loan (C.A. 6, 1936) 80 F.2d 717, 720.

Where the plaintiff seeking reformation of the policy has employed *no diligence*, as in the case at bar, reformation is denied.

"While the mere failure to read a policy does not in itself necessarily prohibit a revision of the contract, yet such failure on the part of the policy holder is a circumstance to be considered by the

court on the question of his negligence. So, also are the experience and intelligence of plaintiff factors to prove his neglect. Unless the policy holder making such excuse gives a satisfactory explanation of his failure to read it, the trial court may be justified in rejecting his excuse and in denying reformation. The court is not bound to accept just any excuse offered by the holder of a policy seeking a reformation of its provisions for his failure to read it at the time he received it."

Taff v. Atlas Assurance Co. (1943) 58 C.A.2d 596, 137 P.2d 483, at 487.

If the insurer is to be charged with an estoppel, it is *entitled to assume* that the plaintiffs would examine the policy. Appellee wishes to emphasize that the endorsement covering the second location bore the limit of liability upon the face of the document. (Plaintiffs' Exhibit 6.) It was not hidden away in some obscure portion of the contract, as the Court found the situation to be in *Gray v. Zurich Insurance Company* (1966) 65 Cal.2d 263, 54 Cal. Rptr. 104.

"Certainly no facts are pleaded showing that defendant knew or could have known that the plaintiff would not examine the policy issued to it; nor that defendant or its agent took any affirmative action to prevent such examination. Plaintiff is therefore not entitled to a revision of the policy."

Bank of Fruitvale v. Fidelity and Casualty Co. of New York (1918) 35 C.A. 666, 170 Pac. 852, at 854.

The *Taff* case, *supra*, which makes material in a reformation case the issue of whether circumstances were such that the insured must exercise some care to read the policy, remains the law, having been expressly approved in 1966.

“‘Reformation of a policy on ground of mutual mistake without the exercise of reasonable care on the part of the insured is not to be encouraged.’”

Laing v. Occidental Life Insurance Co., 244 C.A. 2d 811, 53 Cal. Rptr. 681, at 686, citing the *Taff* case.

Plaintiffs exercised no care at all.

For Appellants to suggest that somehow, the insurance company is charged with knowledge it never received, so as to lay the foundation for an estoppel, is to ask the Court to ignore the express statutory duty of the insured in the matter of making disclosures. *It is the duty of the insured to disclose. It is not the duty of the insurance company to inquire.*

“Each party to a contract of insurance shall communicate to the other, in good faith, *all facts within his knowledge which are or which he believes to be material to the contract* and as to which he makes no warranty, and which the other has not the means of ascertaining.”

Insurance Code, Sec. 332. (Emphasis by counsel.)

The penalty on the insured for violation of Section 332 of the Insurance Code is the avoidance of the policy, see e.g., *Merchants Fire Assurance Corp. v. Lattimore* (C.A. 9, Cal., 1959), 263 F.2d 232. If an insured is bound to make a full disclosure, under penalty of forfeiture of the policy, it seems unreasonable for plaintiffs to assert they are entitled to a reformation of the contract made because they did not make a full disclosure.

Mr. Cordeiro testified he neither asked for \$50,000.00 in insurance, nor did Mr. Hoffman tell him

that he was to get \$50,000.00 in insurance. Both Mr. Hoffman and Mr. Cordeiro agree that Cordeiro said he had an inventory of about \$17,000.00, and equipment and tenants improvements valued at approximately \$3,000.00 to \$4,000.00. On this basis, defendant insurer wrote a \$25,000.00 limit, and so informed Mr. Cordeiro. It could not have been otherwise under the facts and the law.

“Insurance is a contract upon a speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void because the risk run is really different from the risk understood and agreed to be run at the time of the agreement.”

Lord Mansfield in *Carter v. Boehm*, 97 English Reprint 1162, 13 Eng. Ruling Cases 501.

Reformation of the contract can scarcely be predicated upon knowledge of the insurer, when the insured never imparted the same to it, and when the law has placed upon the insured the duty to speak as to all material matters so that the company could be correctly informed.

The final and most convincing evidence that the Appellee did not have knowledge of the facts to satisfy the first requirement of an estoppel is contained in Defendant's Exhibits E, F and H. These are

the field notes of Mr. Hoffman, and the summaries thereof. They were prepared at the time of the conference with Mr. Cordeiro at the new location. They correctly relate the matters which are material to the insurance on the new location. As plaintiff's Exhibit 6 makes clear, and as Messrs. Hoffman and Girdlestone testified, appliances are a fire risk different in character than is new furniture. If Mr. Cordeiro had even remotely suggested to Mr. Hoffman that appliances were to be a main line in the new location (instead of telling Mr. Hoffman that he intended to retain the old location) (RT 75:10-12), the rate would have been different, and the risk would have been different. However, Mr. Hoffman, whose business it was to find out the factors material to the risk, noted on his field notes, "retail furniture store." (Defendant's Exhibit H.) If he had been informed that appliances were involved other than the display models he observed, the inference is irresistible that he would have so noted. His duty to his employer would have required him to do so. Had a full disclosure been made by Mr. Cordeiro, he would have performed that duty.

The record is also totally devoid of evidence to support the second requirement of an estoppel,

"(2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended."

(*Granco Steel case, supra.*)

There is no direct testimony by any person that, even assuming defendant insurer had knowledge never given it, the insurer in any way did anything at all to mislead the insureds. The endorsement with the

\$25,000.00 limit was delivered to Appellants. This itself constitutes notice of what the limit of liability was.

Appellants seek to fill this evidentiary vacuum with a self-serving, bootstrap argument that acts done after the meeting between Mr. Cordeiro and Mr. Hoffman, somehow change the picture. Observe the Appellants on page 22 of the opening brief,

“We are not here to reargue the evidence on the question of whether or not Hoffman told Cordeiro ‘that the limit of liability on the fire insurance on the new location was \$25,000.00’ (CT 84:16-20).”

Indeed! The trial court’s finding on that issue is the end of the case. Mr. Hoffman said he did tell Cordeiro. Cordeiro denied it. The trial court resolved the conflict by believing Mr. Hoffman.

Appellants cannot pass off this adverse finding by declaring that there should have been a finding that Mr. Cordeiro understood that there was a limit of liability of \$25,000.00. What else could the insurance company have done? First, it relied upon Mr. Cordeiro’s representations to Mr. Hoffman. Secondly, it issued the endorsement with the \$25,000.00 limit. *Is not an insurance company entitled to assume, in an arm’s-length transaction, that the insured understands simple English communication?*

Is there any law which places upon the insurance company the duty not only to tell the insured the facts, but then cross-examine the insured to make sure that the insured did in fact understand what he was told?

Appellants' suggestion that there is such a duty is fatuous. If this were not such a serious matter, the suggestion could be characterized as whimsical. We ask the Court to consider for a moment, the incredible state in which industry and commerce would find itself if in every situation where contracts were negotiated between rational adults, after agreement was believed to be had, that one side would have to school-teacher lecture the other as to the agreement actually made under pain of being estopped in later litigation to deny that the contract means something different from what was agreed upon and reduced to writing.

The only situation under the law where a contracting party is bound to any such standard of conduct is where there is a confidential relationship. Appellants are not entitled to impose the confidential relationship standard on the making of the contract which they now seek to reform.

The same argument applies to Appellants' plaintive statement of page 28 of the opening brief:

"We would not be in Court today if Hoffman had said to Cordeiro: 'I have authority to insure your inventory in the new store for only \$25,000; that may be insufficient for your operation; you had best get additional insurance somewhere else.'"

The answer to that is simply, we would not be in Court today if Mr. Cordeiro had made a full disclosure to Mr. Hoffman as is required by Section 332 of the *Insurance Code*.

Implicit in Appellants' complaint in this appeal is that there ought to be a duty on the part of every insurance company to tell the insured how much in-

insurance he ought to have, and the insurer's failure to do this will charge the insurer with liability for such excess of loss over the insurance actually written.

Only the insured knows how much insurance he needs. Only Mr. Cordeiro knew of his intention at the time of the negotiation with Mr. Hoffman (if he even had an intent at that time) to subsequently move a massive inventory of appliances into the new location. How could any insurance company divine what future commercial expediency would induce an insured to increase his inventory?

What Appellants seek to do here is to repeal that chapter of the Insurance Code dealing with the duties of insurer and insured at the time of execution of the contract. (*Insurance Code*, §330, §339.) It wishes to place upon the insurance company the burden of "big brothering" the insured. It wishes to make the insurer inject itself into the insured's business, to nag the insured into doing something to protect himself (and thus earn an additional premium for the insurer) under penalty of being held to a higher liability than that for which it contracted. The ultimate result of Appellants' theory is to require the insurer to substitute its judgment for that of the insured, as to those matters which, until now, have always been committed to the discretion and judgment of the insured.

If there is a duty on the part of the insurer to tell the insured how much insurance he ought to have, then there ought to be a reciprocal duty on the part of the insured to take it. It is interesting to speculate upon what such a rule as Appellants seek for here would do for the welfare of insurance salesmen.

Appellants go forward with more argument based upon a speculation as to "what might have been and so therefore, it should be". This is the tenor of the argument that *if* the insurance company had supplied Mr. Cordeiro with a supply of forms for reporting his values in the form of Plaintiffs' Exhibit 9 for identification, then these would have constituted notice to the insured. Mr. Cordeiro had no knowledge of what the forms he used did say, let alone what the ones he did not use might have said.

"Q. You have no recollection of having signed any reporting forms on your old policy?

A. No, sir.

Q. Did you authorize anybody else to sign them for you?

A. If there was any, usually the bookkeeper done it.

* * * *

Q. With reference to Exhibit 5, the form of report that Mr. Cathcart showed you, sir, do you know where these came from? Do you know where this came from, sir?

A. I presume it came from American Home, sir.

Q. Well, do you recall Mr. Miller handing you a number of those forms?

A. Myself, no, sir.

Q. Do you know if you received a number of these forms in the mail from Mr. Miller or anybody else?

A. Personally, no.

Q. Then as far as you are concerned, the source of that form, except for what it says on the face of it, you have no recollection at all?

A. The only recollection I have is that when I signed I knew they were from American Home.

Q. But you don't know where you got the forms?

A. All I know is what Mr. Miller said, is that these things came from American Home and that we'd have to send them in.

Q. All you know about them is what Mr. Miller told you?

A. Right, sir.

Q. You don't remember having gotten a sheaf of forms in a pad or getting them in the mail or anything like that?

A. No, sir.

Q. Did you ever give any instructions to Mrs. Sylvester, who worked in your office, with respect to the filling out of that form?

A. Yes.

Q. What instructions did you give her, sir?

A. That she should—at that time we was working with Mr. Machado at the time and to send in the inventory and the stock report every month.”

(RT 66:1-6 and 67:6-68:14.)

The information contained on the forms is not notice to the insurance company as to any misapprehension on the part of the insured as to his coverage. *This is because the contract of insurance expressly contemplates that reports of values may be in excess of the limit of liability.*

In this respect the contract (Plaintiffs' Exhibit 6) states in part:

“Any loss in excess of the limits of liability stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium be adjusted on the basis of the full values reported.”

The reason for the reporting form policy of insurance is to place within the sole control of the insured,

the amount of the premium which the insured is willing to bear. The function of the reporting form is to deprive the insurance company of the power to determine the amount of premium. The cases are uniform in their holding that the reports of values to the insurance company are not notice of anything except as to the amount of premium the insured is willing to be liable for. The insured is privileged to report no values, low values, or high values.

“If the insured reported its actual values at the end of each month, it would have complete coverage. But, if it reported less than its actual values, it would have proportionately less coverage and a proportionately smaller premium. *By its reports the insured could not extend the insurer’s liability beyond the agreed limit of liability*, but it could reduce both its premium and its coverage by reporting a less amount of value than it actually had.”

Peters v. Great American Insurance Co. (C.A. 4, 1949) 177 F. 2d 773 at 776. (Emphasis by counsel.)

The *Peters* case, *supra*, also holds that the reports of values do not lay the foundation for an estoppel. Further, the case is authority for the proposition that the doctrine of estoppel cannot be employed, at least in the context of the reporting form policy, to create insurance where none was agreed upon at the outset.

The case of *Camilla Feed Mills, Inc. v. St. Paul Fire & Marine* (C.A. 5, 1949) 177 F. 2d 746, bears a factual relationship to the case at bar. In it, the insured sought to reform, after the loss, an erroneous report of value, on the ground of mistake. The Court ruled the insured was not permitted to do so, the mis-

take being that of the insured in rendering the report. There is no duty on the insurer to dispute the correctness of any report, or investigate the same.

“It would be practically impossible for the insurance companies to check the books of all such insureds at the end of each month. . . . The companies have to depend on the reports of their insureds. The premiums are calculated on the reported values made by the insureds and not on any checked values made by the insurers.”

* * * *

“The liability of the insurer was fixed at the time of loss and the appellant cannot, now, after the fire, increase this liability by offering to pay any additional premiums.”

Camilla Feed Mills, Inc. v. St. Paul etc., Insurance Co., supra, at 751 of 177 F. 2d.

This case specifically holds that an erroneous report of values to the insurance company is not notice except a figure upon which a premium is to be calculated. It necessarily follows that where defendant issued an insurance policy in this case, which policy specifically provided that reports of values may well be in excess of the provisional amount of insurance, a report in excess of \$25,000.00 is not a representation to defendant, or notice to it, that plaintiff made a mistake *at the time* the insurance was originally bargained for. Therefore, the reports cannot operate as the predicate for any kind of estoppel on the company of the right to assert it contracted only for \$25,000.00 insurance.

Even if the plaintiffs here were supplied with the form of report which is Plaintiff's Exhibit 9 for Iden-

tification, its use would not have placed upon the insurer any duty to watchdog the insured.

“Mere silence will not create an estoppel.”

18 *Cal. Juris.* 2d 408.

In point on this issue is *American Building Maintenance Co. v. Indemnity Company of North America* (1932) 214 Cal. 608, 7 P. 2d 305. The insurance company contended that the retention by the insured of an endorsement limiting the coverage, without comment or objection, worked an estoppel on the part of the insured to deny acceptance. The Court held there could be no estoppel based upon silence.

“Appellant [insurer] strongly relies upon the retention of the rider in the office of the plaintiff corporation as creating an estoppel against the plaintiff to deny the validity of the modification of the contract and the consequent elimination of the liability for elevator operations. . . . *We do not think the doctrine of estoppel is applicable. It is to be noted that the claimed estoppel is based not upon an affirmative act on the part of the plaintiff corporation, but upon silence or acquiescence. . . .*”

* * * *

“In estoppel, *there must be something willful and culpable* in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict.”

American Building Maintenance Co. v. Indemnity Co. of N.A., supra, at page 309 of 7 P. 2d.

Where estoppel is predicated upon silence there must be shown a duty to speak.

California Packing Co. v. Sun Maid (C.A. 9, Cal. 1936) 81 F. 2d 674 at 679.

There can be no duty to speak on the part of the insurance company. There was nothing in the conduct of the insured, or the terms of the contract, which gives rise to a duty on the part of the company to tell the insured anything. The entire purpose of the reporting form policy is to place upon the insured the duty to communicate, not to place on the insurer a duty to shepherd the insured and lead him around by the hand. If this were true, the reporting form policy would serve no function.

The case of *Security Insurance Co. v. Old Poin-dexter Distillery, Inc.* (Ky., 1951, 7 C.C.H. Fire & Casualty Reports 588)¹ is illustrative of the reporting form policy, and the obligations under it. The insured therein reported values in excess of the limit of liability, just as plaintiffs did at the case at bar. The report of values over the limit of liability resulted in additional premium being due the insurer. The policy contained the following provision, similar to the American Home policy.

“ . . . Any loss in excess of the limits stated in this policy shall be borne by the insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full value reported.”

The insured contended that it should not be charged a premium when the values reported were in excess of the limit of liability. The Court ruled for the insurance company.

¹Counsel has not been able to locate an official citation. To aid the court, a copy of the published opinion was annexed to the Trial Brief, and is reproduced on pages 67 through 71 of the Court Transcript.

“The [Purpose] of . . . the policy . . . is to measure the protection afforded under the policy by the amount of exposure which the insured is willing to report and pay for. Security had no way of knowing in advance how much Poindexter wanted to insure, but had to rely on Poindexter’s reports of values for that information. Under the policy Security protected Poindexter for the full value of its property at the insured locations, up to the limits of liability stated in the policy, provided that Poindexter paid the premium for such protection. The premium is based on the reports made by Poindexter. If Poindexter chose to report less than the values actually on hand at any location it would pay a smaller premium than if it reported full values and would recover only that proportion of its loss at such location which the values reported bear to the actual values at the location as of the date for which the report was made. Both the insurance protection purchased by Poindexter and the premiums which Security was to receive were determined by the amount of the values reported by Poindexter, *and these reports were in the sole control of Poindexter.*”

Security Insurance Co. v. Old Poindexter Distillery, Inc., supra.

The insurance policy sought to be reformed in this action contemplated reports in excess of the provisional amount of insurance. The amount of the values reported, or the irregularity of the reports, cannot be the foundation for a waiver or an estoppel, for the effect of the report is only to control premium, and amount of insurance within the provisional limit. It does not control anything else and is not notice of anything else.

A necessary element of estoppel is a *justifiable reliance* on the conduct of another. Where the policy gives to the insured the permission to control the amount of premium by his reports of values, there can be no justifiable reliance on any conduct the insurance company manifests. Rather, the reverse is true. The company is entitled to assume the insured knows what he is doing, and intends the reports to be exactly as they were, and to receive premium accordingly. It is more reasonable to declare that by reason of the terms of the policy concerning reports, plaintiffs should be estopped to assert any mistake, rather than vice versa.

So far as the issue of an alleged duty to put the insured on notice of his purported misapprehension, by supplying him with the form which is Plaintiffs' Exhibit 9 for identification, the policy itself is a notice to the insured to render separate reports of values. As testified to by Mr. Girdlestone, the insurer is totally indifferent to the kind of form which the insured may elect to use. He can do it on his letterhead, if he wishes. (RT 96:15-18.)

Finally, Appellants complain that they do not understand the wording of the policy which states: "Any loss in excess of the limits of liability stated in this policy shall be borne by the Insured or by such other insurance to the extent of such excess, notwithstanding the requirement that premium is to be adjusted on the basis of full values reported."

Appellants then torture an interpretation of that clear language into a reading that the report of values in excess of the limit of liability, constitutes "such other insurance".

In the first place, since it is admitted that neither of the appellants read the policy, they would appear to have little equity to contend now that the language of it means something different than they thought it to mean.

Secondly, this is the first time in this cause that the issue of interpretation of the policy has been raised. Raising the point the first time on appeal is too late. The Complaint (CT 1-2) and the Pretrial Conference Order (CT 5) both provide that the issue that was tried in this cause to be the right of plaintiffs to reform, under the doctrine of mistake, or of estoppel, the contract by raising the limit from \$25,000.00 to \$50,000.00. As neither Appellant read the contract, no foundation for estoppel exists, nor can it be based upon an interpretation of the unread document.

Thirdly, if Appellants had read the contract, they would have observed references therein concerning "other insurance" which it was the option of the insured to secure if they saw fit to do so.

Finally, to terminate this response to Section 2 of Appellants' Brief, Defendant and Appellee submits that little is to be gained in the administration of justice by arguing that there is, or may be, some new standard of public morality which is binding only on the insurance company, and which is found enunciated in an article in the California Law Review.

This policy, which plaintiffs did not read, met the standard of *Gray v. Zurich Insurance Company* (1966) 65 Cal. 2d 263. Whatever the social requirements may be with reference to insurance, Appellee clings to the belief that there is still remaining and

enforceable, a traditional standard of private morality which holds that where Mr. Cordeiro tells Mr. Hoffman that he has a \$16,000.00 to \$17,000.00 inventory at the new location; that where Mr. Cordeiro tells Mr. Hoffman he intends to retain the old location which is the appliance store; that where Mr. Cordeiro does not tell Mr. Hoffman of any intent to move the appliance store to the new location; that where Mr. Cordeiro does not ask for \$50,000.00 coverage; and where Mr. Hoffman tells Mr. Cordeiro that he is getting \$25,000.00 coverage, and the insurance is issued accordingly, there are no equities based on a supposed social need which would justify reformation of the contract.

Ordinary social requirements require that written contracts be upheld as written—not altered after the event upon the undocumented assertion by one party that it meant something different to him. Particularly where that person exercised no care of his own to read the contract.

Insurance companies are as much entitled to equal protection of the laws as are insureds. Insurance is a contract upon a speculation, based upon a contingent future event, with a *fixed maximum exposure* by means of policy limits, if the contingency occurs. Is there not a social need to hold that insurers who act in good faith are entitled to rely upon the terms of their contracts which are fairly made?

4. "OBJECTIVE" vs. "SUBJECTIVE" INTENT.

In Section 4 of the Appellants' Brief, it is argued that the "objective intent" of Appellants in the making of the contract, should govern their right to reform it. Two cases are cited, both of which are readily distinguishable from the instant case.

Appellants' reliance on *Maier Brewing Co. v. Pacific National Fire Ins. Co.* (1963) 218 C.A. 2d 869, 33 Cal. Rptr. 67 is misplaced. Because of the emphasis by Appellants, a brief discussion is in order. Insured Maier Brewing Company had insurance exposures at a number of locations, and had a number of policies. The property in question, known as "Gas Company" property, was omitted from the property schedule on the Pacific National policy. There was conflicting evidence tending to show Maier had brought its ownership of the Gas Company property to the attention of the agent. In the transaction which gave rise to the Pacific National contract, "envelopes contained the endorsements with the description of the Gas Company property thereon", were delivered to the agent. The trial Court found as a fact on this evidence that Maier had intended to have the Gas Company property insured on the schedule of properties covered by the Pacific National Contract. The Court ruled that within the factual matrix presented Maier Brewing had a right to assume it was insured—"... what would a reasonable man believe from the outward manifestations of consent." (*Maier Brewing Case*, at 69 of 33 Cal. Rptr.)

That case does nothing for appellants here. The "objective" situation at the time of the negotiations

between Mr. Cordeiro and Mr. Hoffman was that Mr. Cordeiro was keeping the old store in *status quo* ("as is", he told Mr. Miller) and so advised Mr. Hoffman. "Objectively", all Mr. Cordeiro wanted, asked for, and got, was insurance on the furniture store.

The evidence that Mr. Hoffman and Mr. Girdlestone would not have considered fifty thousand dollars as the limit of liability on the new location was introduced to prove that there was no *mutual mistake* as to the amount of insurance. But, in *Maier Brewing Company v. Pacific National*, *supra*, the evidence was that both Maier as insured, and Pacific National's agent, on behalf of the company, both intended to insure all the property Maier had, which was listed on the endorsements delivered to the agent. The mistake was thus found to be mutual, on the "objective standard". The record of the cause at bar will not support such a finding.

The other case upon which Appellants misplace reliance is *Modica v. Hartford Accident and Indemnity Co.* (1965) 236 C.A. 2d 588, 46 Cal. Rptr. 158. This is the "Poor Shoemaker's Case". Mr. Modica, the "Poor Shoemaker" insured stopped school in the fourth grade. His business experience was limited to working in his father's shoe repair shop. His insurance experience was limited to holding a policy of G. I. Insurance as the result of his Navy Service. Defendant's agent undertook to advise the poor shoemaker as to the insurance required. Another broker, attempting to snatch the line, did a critique on the insurance defendant's agent had secured. As a result of this, the poor shoemaker asked defendant's agent

for additional coverage. On more than one occasion, defendant's agent affirmatively represented to the poor shoemaker that he had all the insurance he needed; that he was covered for everything. In fact, there was a prior loss by fire and defendant's agent again told him not to worry; that he was covered for everything. Defendant's agent actually took over the management of the poor shoemaker's insurance affairs. Then the loss in question occurred, and the poor shoemaker discovered he was not covered.

On that state of facts, the Court correctly permitted reformation.

The Appellants herein cannot bring their situation within the facts of the poor shoemaker's case.

5. PUBLIC POLICY.

Appellants assert that the form of the contract of insurance is against public policy. They contend that where the premiums are measured by the reports of values, and not by the limit of liability contracted for, that the contract is somehow violative of public policy.

The public policy argument is always suspect.

"It [public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. *It is never argued at all but when other points fail.*"

Burrough, J., in *Richardson v. Mellish* (1824)

2. Bing. 229, 252, New York. (Emphasis by counsel.)

Appellants cite no authority that it is against the interests of the commonweal for insurers and insureds to contract to fix the premium in accordance with the amount of property which is subject to the peril insured against. Neither case cited supports Appellants' view. In particular, *Ohran v. National Automobile Ins. Co.* (1947) 82 C.A. 2d 636, 187 P. 2d 66 is destructive of Appellants' position. In that case the Court ruled that the company was entitled to its premium when it was at risk by operation of law, in spite of the insured's declared intent to cancel the policy, and not pay a premium.

The second objection to the public policy argument is that it, like the policy interpretation argument is being raised now for the first time on appeal.

The third objection is one based upon simple logic and reason. American Home Assurance Company agreed to be at risk on a stock of goods at the new location, with a limit of liability of \$25,000.00, premiums to be determined upon the total reported values at the location. One does not have to be versed in insurance to know that most losses by fire are partial losses. Seldom is the fire loss to property total. Fire insurance premiums are based on a statistical probability of loss, both as to the projected number of fires, and the probability of a total loss in such fires. It requires little wisdom to conclude that if the limit of liability on the fire insurance is \$25,000.00, and a greater amount of goods are kept at the insured location (in this case \$42,185.35, CT 35), the odds against there being a \$25,000.00 loss at the insured location

are substantially greater than if the maximum amount of goods subject to the fire is only \$25,000.00.

In other words, since most fire losses are less than total, if there is \$25,000.00 or less in values subject to loss by fire, the chances are that the loss will be less than \$25,000.00. And a premium is fixed accordingly. But if there are \$42,000.00 worth of goods subject to loss by fire, the odds on there being a \$25,000.00 loss are substantially greater. Therefore, *the premium is based upon the total values exposed to loss, not the total values insured.* Which is exactly the formula employed here to fix the premium.

Appellants' public policy argument fails in its entirety.

**6. THERE IS ADEQUATE BASIS IN THE RECORD
TO SUPPORT THE FINDINGS.**

Appellee respectfully submits that Appellants are nit-picking when they contend the findings are not supported. The trial judge found Mr. Hoffman told plaintiffs there was a \$25,000.00 limit on the new location. Appellants ask, is that the only duty of Mr. Hoffman? The answer to that is, what other duty is there? There is no allegation of fraud herein. There is no law cited by Appellants that the insurer has any other duty than to act in good faith and make a full disclosure, which it did. Which is substantially more than can be said for the conduct of plaintiffs..

A complaint is made that there is no finding that plaintiffs "heard Hoffman tell them" that the limit was \$25,000.00. There is another complaint that there

is no finding that Mr. Hoffman did not advise of the consequences of future and different acts by plaintiffs. And so on.

We are concerned herein with a contract of insurance, and its making. The Court found that it was made, and that there was neither unilateral, or mutual mistake. It also found no estoppel based upon the recited conduct. Nothing else need be shown. A finding that "A told a fact to B", necessarily imports B heard it and understood it. If this were not true, no judge or lawyer could draft supportable findings of fact. A finding that "a man bit a dog", does not require an additional finding that the "dog felt the man bite him".

**7. APPELLANTS' SPECIFICATION OF ERRORS
ARE THEMSELVES INCORRECT.**

Whether Mr. Cordeiro, in testifying as he did, was motivated in part by the natural human reaction that "The wish is the father of the thought," was a matter for the trial court to decide. It was decided against Mr. Cordeiro. But illustrative of the fact that one can misplace words, and thereby convey a different meaning than one might have intended, just as Mr. Cordeiro may have intended to make a full disclosure but did not, is Appellants' No. 3 of the Specification of Errors (Appellants' Brief, page 3).

The brief reads in part:

"3. The finding (CT 84:16-20) that defendant's agent *Hoffman* 'handled' all the negotiations on

behalf of both plaintiffs' and told plaintiffs that . . ."

In fact, CT 84:16-20 reads:

" . . . Plaintiff Edwin *Cordeiro* who handled all the negotiations on behalf of both plaintiffs . . ."

This, of course, is a simple error in transposition of the names of the actors. But it demonstrates human frailties from which we all suffer.

So also, in Specification No. 4 (Appellants' Brief, page 4), a finding of fact wherein there was an obvious typographical error in its transcription, is seized upon as "confusing and contradictory" by Appellants. CT, p. 84, line 20, requires only the substitution of the word "at" for "of" for the correct meaning. Appellee is confident that no one was misled by this typographical error, any more than any one was, or will be, misled by the transposition of names in Appellants' Specification No. 3.

Thus, in the record of this cause, it is demonstrated that people make mistakes in the employment of words. They make them in spite of training and practice in careful draftsmanship. And of all of the documents which working lawyers prepare, none generates as much blood, sweat and tears as the preparation of findings of fact and conclusions of law, or briefs on appeal.

So, if working lawyers can make mistakes why cannot Mr. Cordeiro? The trial court found that the mistake, if any, was by Mr. Cordeiro alone. It found that it was not an error shared by Mr. Hoffman or

the defendant. The trial court also found nothing in the facts which justified invocation of the doctrine of estoppel.

V. CONCLUSION.

The reporting form of fire insurance policy, with its limit of liability, but which commits to the insured the power to determine how much insurance he wants, or is willing to pay for, within that limit, is a valuable instrument of commerce. The reformation of this, or any other contract, should not be permitted without a showing of the kind of mistake which has been traditionally required in such cases.

The trial judge found neither the required evidence of mistake, nor did it find conduct upon which an estoppel could be predicated. The estoppel cases relied on by Appellants, *Ivey v. United National, etc.*, *Modica v. Hartford, etc.*, *Gray v. Zurich (supra)*, were all urged upon the trial judge. There is nothing new in the appeal which warrants a change in the trial court determination. Defendant Appellee respectfully submits the trial court should be affirmed.

Dated, San Francisco, California,
August 19, 1968.

THORNTON & TAYLOR,
By JEROME F. DOWNS,
Attorneys for Appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,)
)
 Appellant,)
)
 vs.)
)
 PAINTERS LOCAL UNION NO. 260,)
)
 Appellee.)
)

21842 ✓

Appeal From The United States District
Court For The District Of Montana
Great Falls Division

The Honorable Russell E. Smith, District Judge

APPELLANT'S BRIEF

FILED

AUG 18 1967

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS
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PAINTERS LOCAL UNION NO. 260,)
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NO. 2 1 8 4 2

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Appellant,)	
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)	
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)	
Appellee.)	
_____)	

STATEMENT OF PLEADINGS

This is an action commenced by the appellees in the Federal District Court of Montana, Great Falls Division, by the filing of a Complaint in said Court on January 11, 1967. Service of process was made on the appellant by use of the Montana "Long Arm" statute and the Summons and Complaint were served upon the appellant in Washington by a United States Marshal. On January 26, 1967, the appellant noted for hearing a Motion to Quash Service of Process, or in the alternative, to Change Venue to the Western District of Washington, Northern Division.

Appellants motions were subsequently denied, however, the District Court certified that there existed substantial ground for differences of opinion and allowed for an immediate application for an interlocutory appeal pursuant to 28 USC 1292(b) and Rule on Appeal 38.

JURISDICTION OF DISTRICT COURT

Jurisdiction of the Montana District Court is alleged to exist by virtue of Section 301 of the Labor Management Relations Act, as amended (hereafter referred to as 29 USC 185), and Rule 4 (e) of the Federal Rules of Civil Procedure.

Jurisdiction of the Montana District Court is alleged to exist under 29 USC 185 (a) and (c) which provide:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the divided states having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. "

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members. "

Personal jurisdiction over the appellant is alleged to exist by virtue of service of process upon the appellant in the State of Washington pursuant to Rule 4 (e) FRCP, which provides in pertinent part:

" . . . Wherever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 B (1) (a) of the Montana Rules of Civil Procedure

(MRCP) provides in part:

"(1) Subject to jurisdiction. All persons found within the State of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, although an employee, or through an agent, of any of the following acts:

(a) The transaction of any business within this state;"

STATEMENT OF THE CASE

The appellee, Painters Local Union No. 260, plaintiff below, filed this action on January 11, 1967, in the District of Montana (Tr. Vol. 1, Pg. 1). Its Complaint alleges the violation of an industry wide collective bargaining agreement between an employer group and a group of labor organizations (Tr. Vol. 1, Pg. 3). It asserts the right of recovery, based in part upon 29 USC 185 (a), otherwise known as Section 301 (a) of the Labor Management Relations Act, as amended.

The appellant, defendant below, is and was a painting contractor who had a defense contract to do certain painting work on a

federal military reservation or enclave known as Malmstrom Air Force Base (Tr. Vol. 2, Pg. 6). This contract required the painting of some 300 housing units and the repairing of 31 carport slabs, all of which were located within the aforementioned military reservation.

The plaintiff, apparently believing itself to be a third-party beneficiary of the Washington Agreement, claimed that it was harmed by an alleged violation by the defendant of the provisions of certain local rules under what was called a local "Great Falls" bargaining agreement (Tr. Vol. 1, Pg. 2-3). The plaintiff claimed that defendant was required to observe the local rules by virtue of being a signatory to an agreement in effect in western Washington, where the defendant resides and has its principal place of business.

Defendant is incorporated in Washington and is now and at all times material hereto had its principal place of business in western Washington. Defendant has never been licensed to do business in the State of Montana and has, in fact, only been in Montana in connection with the performance of the above mentioned government contract at Malmstrom Air Force Base. Defendant completed its contract in August of 1966 and immediately thereafter returned with all its equipment and employees to western Washington. While at Malmstrom Air Force Base, the defendant did hire some local employees and the plaintiff claims such hiring to have been in violation of the "Great Falls" Agreement (Tr. Vol. 1, Pg. 3).

Plaintiff made service of process upon the defendant in western Washington on January 16, 1967 (Tr. Vol. 1, Pg. 21-21a). On January 26, 1967, the defendant noted for hearing its Motion to Quash

Service of Process, or in the alternative, to Change Venue to the Western District of Washington, Northern Division (Tr. Vol. 1, Pg. 22). Defendants motions came on for hearing on March 14, 1967, and the same were denied (Tr. Vol. 2, Pg. 21), with the leave and certification by the Court, pursuant to 28 USCA 1292, to pursue an interlocutory appeal (Tr. Vol. 1, Pg. 44).

The questions presented in the defendant's motion in District Court and in this appeal are as follows:

(1) May the conduct of a party which occurs within the confines of a federal enclave over which the United States of America has exclusive legislative jurisdiction be subject to the local state rules of civil procedure governing extra-territorial service of process under a long-arm statute, and

(2) Does conduct and activity with regard to the performance of a government contract, exclusively on and within a federal enclave, with exception of the hiring of certain local employees, meet the "minimum contacts" requirement so as to allow extra territorial service of process without violation of the due process requirements of the 14th Amendment to the U. S. Constitution, and

(3) Does 28 USCA 1391 (b) governing venue generally control the proper venue in a cause in which the Complaint and right of action is asserted under 29 USCA 185 (a) and (c), and

(4) Does 28 USCA 1391 (c) which allows for suit against a corporation in any district in which it "is doing business" allow for a suit in said district when the corporation has ceased to do business in said district at the time of commencement of an action and service of process.

SPECIFICATION OF ERRORS

The District Court of Montana erred in its decision in the following respects.

(1) In finding that the conduct of the defendant at Malmstrom Air Force Base met the "minimum contact" requirements so as to allow extra territorial service of process without violating provisions of the 14th Amendment of the United States Constitution.

(2) In finding that the state rules of civil procedure apply to conduct on and within a federal enclave.

(3) In finding that venue for this suit was proper in the District Court of Montana, rather than in the Western District of Washington, Northern Division.

ARGUMENT OF APPELLANT

Jurisdiction

Considering first the question of jurisdiction, it is the position of the appellant that when jurisdiction is asserted via what is commonly referred to as a "long-arm" statute, whether a state or federal

court, due process of law requires that there must have been the required minimum contact between the defendant and the locus of the forum so as to not violate "fundamental fairness test" as set forth in International Shoe Company v. State of Washington, 326 U.S. 310 (1945); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Travelers Health Ass'n. v. Com. of Virginia ex rel. State Corporation Comm., 339 U.S. 643 (1958); and Hanson v. Denckla, 357 U.S. 235 (1958).

It is appellant's position that by entering into the contract with the Department of Defense, which contract was performed on and exclusively within a federal enclave, Malmstrom Air Force Base, and that the only contact with the State of Montana was to hire certain local residents, that these "contacts" are not sufficient under the test as set forth in Hanson v. Denckla, supra, at Page 253. There the Supreme Court said:

"The application of that rule (requirement of contact with the forum state) will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." (emphasis added).

In the instant case, the appellant was not licensed to do business in the State of Montana, did not in fact do any business in said state, but was working solely for the Federal Government within a federal enclave. Of significance regarding this latter point is the fact

that in the event of any dispute concerning the appellant's contract, the Federal Law and the Federal Courts would be invoked and not the laws or courts of Montana.

Two cases in point on this question of activities within a federal enclave are Knott Corp. v. Furman, 163 F. 2d 199, certiorari denied, 332 U.S. 809, 68 S.Ct. 111, 92 L. Ed. 387 (1947); and Ackerley v. Commercial Credit Co., 111 F. Supp. 92 (1953).

The Knott case involved a hotel which was maintained on a military reservation and a person was injured while a guest at the hotel. The court said that the defendant was doing business in the State of Virginia for jurisdiction purposes, even though the business was within a federal enclave, but this result was reached because the contact with citizens of said state was the same as any other corporation doing business in Virginia. The use of the hotel was not restricted to military personnel, but open to all visitors on the reservation.

The Ackerley case involved a suit for wrongful death wherein one of the defendants, Ibrandtsen Company, Inc., in arguing its Motion to Dismiss for Lack of Jurisdiction, urged that its activities in New Jersey within a federal enclave should be ignored in deciding if it was doing business in New Jersey. The court answered in the negative citing the Knott case, *supra*, but specifically found that Ibrandtsen Company did carry on substantial activities within New Jersey that were not on a federal enclave.

It is submitted that the above two cases differ substantially on their facts from the instant case, because the defendant here never engaged in any activity outside of Malmstrom Air Force Base, whereas in the Knott and Ackerley cases, the defendants activities were shown to be substantially involved with the citizens of the state in which the enclave was located.

Further, Article 1, Section 8, Clause 17, of the United States Constitution provides with regard to control and jurisdiction of federal enclaves for the United States:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings, . . .
(emphasis supplied).

This constitutional declaration could not be broader or clearer and by virtue of it any other authority, other than that of Congress, is excluded. Ft. Leavenworth R. Co. v. Lowe, S.Ct. 995, 114 U.S. 525, 532, 29 L.Ed. 264 (1885); Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930). Likewise such enclaves, particularly military reservations, do not constitute a part of the state in which they are located for general jurisdictional purposes. Murphy v. Lowe, (C.A. Kan 1957) 249 F.2d 783, certiorari denied, 78 S.Ct. 544, 355 U.S. 958, 2 L.Ed. 533.

The above adequately points out that the Montana Civil Rules of Procedure, in particular, Rule 4 B(1)(a) known as the Montana "Long-Arm" statute, will not be effective to obtain jurisdiction of the appellant because its activities were not in Montana, but within a federal enclave, and secondly, because the State of Montana does not have legislative jurisdiction over the area or activities within a federal enclave.

V E N U E

The question of venue for the commencement of a civil action in Federal District Court is controlled by 28 USCA 1391, the pertinent subsection thereof providing:

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The Complaint of the appellee states that its action is based upon 29 USCA 185(a), (Section 301(a) of the Labor Management Relations Act, as amended). The affidavit of the appellant demonstrates that it has its principal place of business in western Washington, that it did not maintain any agent, offices or employees in the State of Montana, nor was it licensed or qualified to do business in Montana. These facts are not now, nor have they been controverted by the appellee.

Therefore, unless "otherwise provided by law" as set forth in 28 USC 1391, supra, venue must lie in the Western District of

Washington, Northern Division.

The appellee in his brief and argument in the District Court of Montana argues that venue other than that specific in 28 USC 1391 is provided for in 29 USC 185(c) wherein it is stated:

"For the purposes of actions and proceedings by or against labor organizations in the District Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the District in which such organization maintains its principal office, or (2) in any District in which its duly authorized officers or agents are engaged in representing or acting for employee members."

This provision does admittedly grant increased jurisdiction over labor organizations, but it is the appellants contention that this relaxation or extension of venue requirements does not affect other individuals or entities involved in controversies with labor organizations.

The interpretation of this section is correctly and succinctly set forth in International Ass'n. of Machinists v. Smiley, (1948) 76 F. Supp. 800, wherein the Court stated at Page 801.

"Section 301 (c) specifically limits its relaxation of venue requirements to grant increased jurisdiction over a labor organization. It does not grant jurisdiction to the Court over other parties who are inhabitants of another District and who do not waive their right to insist on proper venue."

See also Dixie Carriers, Inc. v. Nat'l. Maritime Union of America, AFL-CIO, 35 FRD 365 (1964).

The last consideration to be made with regard to venue is the applicability and interpretation of 28USC 1391 (c) which provides as follows:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

A diversity of opinion exists with regard to the time applicable to the phrase "doing business". In the instant case, it is not controverted that the appellant was not licensed to do business in Montana, nor that it was not incorporated or present in said state at the time that this action was commenced. It may be contended, however, that the phrase "doing business" applies to the time during which the cause of action arose. Although as contended by the appellant at the outset of its brief, it was not doing business in Montana, but rather acting on and within a federal enclave. For the sake of discussion of 28 USC 1391 (c), it will be assumed that it was doing business in Montana at the time the cause of action arose.

It should, however, be borne in mind that the appellant was not engaged in any activities at Malmstrom Air Force Base, or anywhere else in Montana, at the time that the appellee commenced this suit, or served the appellant in Washington.

Some courts have interpreted 1391 (c) as allowing for venue in the district where the corporation was "doing business" at the time the cause of action arose. Nelson v. Victory Elec. Works, Inc., (1962) 210 F.Supp. 954, and Farmers Elevator Mutual Insurance Co. v. Carl J. Austad & Sons, Inc., (1965) 343 F.2d 7. A reading of these cases reveals that the Nelson case actually was decided on the basis of the defendant's failure to timely raise the question of improper venue and the Farmers

case, supra, cites the Nelson case as authority for the same interpretation of this phrase.

The better reasoned cases hold that the meaning of the phrase "doing business" as read in the context of 28 USC 1391 (c) is in the present tense and an uncontorted reading thereof requires that the phrase be held to mean "doing business" at the time of the commencement of the suit.

As stated in Satterfield v. Lehigh Val. R. Co., (1955)

128 F.Supp. 699 at Page 670:

"This court has personal jurisdiction over Millard and venue was properly laid in this district if Millard was 'doing business' in this district at the time of the alleged service of process upon it, 28 USC 1391 (c). "

Accord Hall v. Rubin, (1965) 240 F.Supp. 490; Brewer v.

Rubin, (1965) 240 F.Supp. 467; Powell v. Seaelectro, Inc., (1962) 205 F.

Supp. 6.

To interpret the language of 28 USC 1391 (c) other than as meaning "doing business" at a time the time of the commencement of the action would do violence to the clear and unambiguous language of said section.

Based upon the foregoing authorities and reasons, it is respectfully urged that the decision of the District Court of Montana be reversed and that the service of process upon the appellants be quashed, or in the alternative, that this action be dismissed or venue

transferred to the Western District of Washington, Northern Division,
pursuant to the provision of 28 USC 1406.

Respectfully submitted,

GUTTORMSEN, SCHOLFIELD, WILLITS & AGER

By

Attorneys for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,

Appellant,

vs.

PAINTERS LOCAL UNION NO. 260,

Appellee.

NO. 2 1 8 4 2

C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GUTTORMSEN, SCHOLFIELD, WILLITS & AGER

By

Of Attorneys for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,)	
Appellant,)	
vs.)	NO. 21842
PAINTERS LOCAL UNION NO. 260,)	
Appellee.)	

Appeal From The United States District
Court For The District of Montana
Great Falls Division

The Honorable Russell E. Smith, District Judge

APPELLEE'S BRIEF

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,)

Appellant,)

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FOR THE NINTH CIRCUIT

SWANSON PAINTING COMPANY,)

Appellant,)

-vs-)

NO. 2 1 8 4 2

PAINTERS LOCAL UNION NO. 260,)

Appellee.)

I. STATEMENT OF PLEADINGS AND JURISDICTION

Suit was commenced in the United States District Court for the District of Montana, Great Falls Division, by PAINTERS LOCAL UNION NO. 260 against SWANSON PAINTING COMPANY on January 11, 1967. The case is based on Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. 185). Personal service on Swan B. Swanson, President of the Defendant corporation, was made at Woodinville, Washington on January 16, 1967, pursuant to Rule 4 D (3) of the Montana Rules of Civil Procedure, and Rule 4 (e) of the Federal Rules of Civil Procedure. Service was by a United States Marshal. On January 26, 1967, Appellant noticed for hearing a Motion to quash service of process or to change venue. Hearing was held before the District Court on March 14, 1967, and Appellant's Motions were denied.

Thereafter, upon Appellant's request, the District Court certified a substantial ground for difference of opinion and allowed interlocutory appeal pursuant to 28 U.S.C. 1292 (b) and the Appellant perfected its appeal.

Section 301 of the Labor-Management Relations Act of 1947, Subsections (a) and (c), provide as follows:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office; or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Rule 4 (e) of the Federal Rules of Civil Procedure provides for service upon a party not an inhabitant or found within a state as follows:

"(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 B (1) (a) and (e) of the Montana Rules of Civil Procedure provide:

"B. Jurisdiction of Persons.

"(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

"(a) the transaction of any business within this state;

"(e) entering into a contract for services to be rendered or materials to be furnished in this state by such person;"

Rule 4 D (3) of the Montana Rules provides in part:

"(3) Personal Service Outside the State. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state . . . "

II. ARGUMENT

In its Brief SWANSON raises three issues based on three alleged errors in the District Court's decision: The problem of whether "minimum contact" requirements have been met sufficiently to allow extraterritorial service of process under the Fourteenth Amendment; the problem of applying State Rules of Civil Procedure within a "federal enclave;" and the problem of venue in Montana.

A. There are sufficient "Minimum Contacts" to support application of the Montana "Long-Arm" Statute.

Appellant in its Brief admits that it had a contract to paint 300 housing units and repair 31 carport slabs at Malmstrom Air Force Base near Great Falls, Montana (Tr. Vol. 2, Pg. 6). Appellant further admits that while in Great Falls, Montana, it hired local employees (Tr. Vol. 1, Pg. 3), and, of course, these employees lived in Montana, transported their equipment through Montana, purchased supplies and equipment in Montana, and generally supported their painting operation there. In addition, Plaintiff's Complaint alleges other activities in Montana, particularly in Paragraph VI thereof, where Plaintiff states that SWANSON registered its job with the PAINTERS UNION in Great Falls, Montana.

Under these circumstances, there seems to be little room to argue that there were not "minimum contacts" sufficient to invoke the jurisdiction of Montana under the rule laid down in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057.

The line of cases following International Shoe is well developed in 2 Moore's Federal Practice at page 1165 and following.

To understand the Federal District Court's reluctance to accept SWANSON's position in this case, attention should perhaps be drawn to two recent cases by that Court. In Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79, decided early in 1967, Judge Smith determined that the activities of a company in Ohio which sold products in Montana with no agent here, but with orders delivered from Chicago, amounted to a sufficient "minimum contact." An even more recent Montana case on "minimum contact" is Continental Oil Co. v. Atwood and Morrell, 265 F. Supp. 692. In it Judge Jameson again upheld the Montana "Long-Arm" statute where a Massachusetts company shipped a manufactured component to Billings, Montana. In that case the Massachusetts company had no Montana agents and the part was ordered by a New York subcontractor. The Massachusetts company was not qualified to do business in Montana and had made no other shipments into Montana, but did know that this shipment went to Montana. Both these Montana cases relied heavily upon the Ninth Circuit case of L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F. 2d 768, and applied the "reasonableness" tests set forth in that case:

"(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.

"(2) The cause of action must be one which arises out of, results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'

"(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If

this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens."

Rule One would seemingly be met in our case because SWANSON painted houses within the forum; Rule Two is met because the cause of action arises from breach of a labor contract which directly concerned SWANSON's painting in Montana, and by its hiring in Montana; Rule Three should be met because, having come into Montana and spent an entire summer painting here, it does not seem unfair or unreasonable to subject SWANSON to Montana jurisdiction.

Appellant's Brief indicates that perhaps it does not intend to seriously contend that there were insufficient minimum contacts, because Appellant seems to base its jurisdictional argument upon the contention that its work was performed exclusively on the Air Base. Ignoring for the moment the fact that all of its contacts were not exclusively on the Air Base, it would seem that Appellant misconstrues Rule 4 (e) of the Federal Rules of Civil Procedure when it tries to avoid the Rule because the work was on a "federal enclave." Rule 4 (e) merely says that a Federal Court shall use the local method of service when the Court sits in a State which has such a local method. Jurisdiction derives from the Federal Statute; the State of Montana also has jurisdiction because the Appellant transacted business and entered into a contract for services to be rendered in Montana. But the application of Rule 4 (e) concerning service should only depend on the fact that the state in which the Federal Court sits has a "Long-Arm" Statute, not whether the work was done on or off a federal enclave.

B. The Federal Enclave Problem.

Appellant argues in its Brief that it should escape jurisdiction in Montana because the bulk of its contract was performed on Malmstrom Air

Force Base. The two cases cited in Appellant's Brief do not sustain its position. They actually sustain Appellee's position because even here SWANSON PAINTING COMPANY carried on substantial activities within Montana and off the Air Base (hiring; registering with the Union).

But, more important, Appellant's contentions about the application of Article I, Section 8, Clause 17 of the Federal Constitution have not been sustained by the Courts. Granting that the Federal Constitution contains the language quoted in Appellant's Brief concerning "exclusive" jurisdiction over places "purchased by the consent of the Legislature of the State in which the same shall be," Appellant has overlooked the significance of the Legislative consent required. In James v. Dravo Contracting Co., 302 U.S. 134, 58 Sup. Ct. 208, 114 A.L.R. 318, the United States Supreme Court held that states can qualify sales of land to the United States so as to retain jurisdiction. The respondent in that case had raised the same Constitutional issue which Appellant raises here.

The Court said:

"Respondent contends that by virtue of Article 1, Section 8, Clause 17, of the Federal Constitution the United States acquired exclusive jurisdiction.

"Clause 17 provides that Congress shall have power 'to exercise exclusive legislation' over 'all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.' 'Exclusive legislation' is consistent only with exclusive jurisdiction. Surplus Trading Co. v. Cook, supra (281 U.S. 652, 74 L. ed. 1095, 50 S. Ct. 455). As we said in that case, it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands 'remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.' Id., p. 650. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is,

consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction." (Citing cases.)

The State of Montana in its General Cession Statute, 83-108 R.C.M. (1947), has provided reservations for civil and criminal jurisdiction:

"Jurisdiction over lands purchased by United States. Pursuant to Article 1, Section 8, Paragraph 17 of the Constitution of the United States, consent to purchase is hereby given, and exclusive jurisdiction ceded, to the United States over and with respect to any lands within the limits of this state, which shall be acquired by the complete purchase by the United States for any of the purposes described in said paragraph of the Constitution of the United States, said jurisdiction to continue as long as said lands are held and occupied by the United States for said purposes; reserving, however, to this State the right to serve and execute civil or criminal process lawfully issued by the courts of the State, within the limits of the territory over which jurisdiction is ceded in any suits or transactions for or on account of any rights obtained, obligations incurred, or crimes committed in this State, within or without such territory; . . . "

The reservations by Montana of jurisdiction "in any suits or transactions for or on account of any rights obtained, obligations incurred" would seem to be a broad enough reservation of jurisdiction to encompass the civil acts involved in this case. This reservation is different from the reservation contained in the statutes ceding land for Yellowstone and Glacier Parks (83-104 and 83-106, R.C.M. 1947). These statutes reserve criminal jurisdiction and process for crimes committed "outside" such Parks. But the general cession statute contains the phrase "within or without such territory," indicating that the jurisdiction is reserved even on the Air Base itself.

Historically, it should be noted that the cession statute referred to above was amended in 1939, when the present reservation was added and the words "within or without such territory" were added. Malmstrom Air Force Base was purchased since 1939.

The Montana Supreme Court, in State v. Rindal, 404 P. 2d 327, has interpreted the cession statute as applied to missile sites owned by

the Federal Government in conjunction with Malmstrom Air Force Base in Montana. The Supreme Court held that, as amended, the statute allowed the State to exercise criminal jurisdiction over offenses committed inside the territory as well as outside and removed any doubt about State criminal jurisdiction over such lands. The issue was also raised before the Montana Supreme Court in State v. District Court, 410 P. 2d 459, a 1966 case, where a defendant sought a Writ of Prohibition to avoid criminal prosecution for a crime committed on Malmstrom Air Force Base. The Montana Supreme Court quoted the Dravo case and then specifically applied the reservation contained in the Montana cession statute to Malmstrom Air Force Base for criminal jurisdiction. In Parker v. State, Opinion dated April 21, 1966, 23 State Reporter 344, an application for a Writ of Habeas Corpus was presented to the Federal District Court concerning the same matter, and that Court sustained the State jurisdiction over Malmstrom Air Force Base. The District Court pointed out that the War Department, in accepting jurisdiction (40 U.S.C. 255) specifically referred to Section 83-108, R.C.M. 1947, and that the United States has never objected to the retention of jurisdiction by the State. It would seem that the reservation under the cession statute is broad enough to cover civil causes in the same manner in which these Courts have held State jurisdiction extends to the Air Base for criminal matters.

C. Venue For This Case is Properly Laid in Montana

PAINTERS LOCAL UNION NO. 260 contends that Section 301 of the Labor-Management Relations Act (29 U.S.C. 185) is itself a venue statute. Subsection (a) of this statute states that suits for violation of contract between an employer and a labor organization "may be brought in any District Court of the United States having jurisdiction of the parties" This broad language would seem to be sufficient to sustain the bringing

of the action in the Federal Court in Montana. Section 301 is a part of our broad national labor policy and is a special statute granting a special right to sue on labor contracts. That such suit should be brought in the jurisdiction in which the work takes place and the contract is applicable would seem sensible from the point of view of convenience of witnesses and ease of trial. Appellant wishes to ignore the plain language of Section 301 and depend on the general venue statutes in an attempt to move the case out of the Montana jurisdiction.

Appellee is concerned that such a move out of the Montana jurisdiction not only would be inconvenient, but might divest the PAINTERS union of its right to bring any action against SWANSON PAINTING COMPANY because of Subsection (c) of Section 301. This Section provides that for purposes of actions by labor organizations, the District Court shall have jurisdiction over labor organizations only "(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." PAINTERS LOCAL UNION NO. 260 does not maintain any office in the State of Washington and does not have any officers or agents acting there, so conceivably it would have no right to bring an action against the SWANSON PAINTING COMPANY in the State of Washington. Appellee thus fears that it will lose its entire remedy unless Subsection (a) of Section 301 means that the action may be brought in "any District Court."

Appellant has quoted International Association of Machinists v. Smiley, 76 F. Supp 800, concerning where venue lies. It should perhaps be pointed out that Appellee here does not depend on Subsection (c) to grant venue in Montana, but rather upon Subsection (a) of Section 301. The Machinists case deals only with the interpretation of Subsection 301 (c).

The case was not even between an employer and a union. It is inapplicable here.

Appellant depends upon the general venue statute, 28 U.S.C. 1391, and particularly Subsection (b). This subsection, of course, contains a reservation "except as otherwise provided by law" which would make it ineffective in the face of Section 301, or, for that matter, in the face of Section 28 U.S.C. 1391 (c):

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Had SWANSON PAINTING COMPANY been licensed to do business in Montana, it clearly would have been subject to Montana jurisdiction. Apparently Appellant claims that by its failure to follow the provisions of the Montana Corporation Code, Section 15-1701, R.C.M. 1947, requiring all foreign corporations to file before doing business within the State, it somehow achieves immunity from State jurisdiction. A companion Section, 15-1702, requires the appointment of an agent for service of process, and Section 15-1703 provides that such foreign corporations who have failed to file cannot enforce their contracts in Montana. Appellee feels that Appellant should be estopped to deny its presence in Montana where it must depend upon the violation of the Montana Corporation Code to maintain this position. L'Heureux v. Central American Airways, 209 F. Supp. 713.

More important, however, is the phrase in 1391 (c) that a corporation may be sued in any judicial district in which it is "doing business." Appellant contends in its brief that the "better reasoned cases" hold that "doing business" refers to business being done at the time of service of process. It quotes Satterfield v. Lehigh Valley Railway Company, 128 F. Supp. 669. But that was a case concerned with whether there were enough "contacts" with the State to justify jurisdiction. The Court

did not even discuss whether the time of "doing business" was the time that the cause of action arose or the time that the service took place. The quotation in Appellant's Brief merely happened fortuitously to state the problem in terms of time of service. Appellant also quotes Brenner v. Rubin and Hall v. Rubin, 240 F. Supp. 467 and 470 respectively. But these are cases involving service of process, not venue. The Court does discuss Section 1391 (b) concerning venue, but that is not the Section Appellee depends on in this case. Again, Powell v. Sealelectro, Inc., 205 F. Supp 6, quoted by Appellant is a case involving whether there are sufficient "contacts" rather than a case involving what time the Defendant must be "doing business." None of Appellant's cases support its proposition.

On the other hand, there are well reasoned opinions to the effect that the time of "doing business" is the time that the cause of action arises. See, for example, Nelson v. Victory Elec. Works, Inc., 210 F. Supp. 954. In that case the Court quotes from Chief Judge Thomsen in the case of L'Heureux v. Central American Airways, Supra, as follows:

" * * * the purpose of Congress in enacting Sec. 1391 (c) can be fully achieved only if foreign corporations--both those which qualify to do business and those which do not qualify--can be sued in the federal court in actions arising out of business done in the state and district where the suit is filed. I believe Congress intended that the venue requirements of Sec. 1391 (c) may be satisfied by showing that the defendant was doing business in the district at the time the cause of action arose, and that the cause of action arose out of that business. Those facts are alleged in the complaint in this case, and are not disputed. The motion to dismiss, therefore, must be denied."

Then the Court goes even further than the decision in L'Heureux:

"(2, 3) We agree with the reasoning and conclusions expressed in the L'Heureux case. However, we believe a somewhat more extreme construction of Section 1391 (c) is warranted. In cases such as the instant one, arising out of a foreign corporation's business in the state and district in which suit is filed, such foreign corporation should be deemed to be 'doing business' within the meaning of Section 1391 (c), if the corporation is amenable to service of process under the appropriate state statutes and if the minimal constitutional standards of the International Shoe case, supra, are met. This construction of the 'doing business'

clause was implicit in the decision of this court (per Watkins, D.J.) in Wanamaker v. Lewis, D.C., 153 F. Supp. 195 (1957), and its reasonableness seems obvious. 'If it is not unfair to subject the corporation to the court's jurisdiction by service of process, it seems wise and not unfair to hold that there is a proper venue, particularly when the case can be transferred to another venue, if convenience warrants.' 1 Moore's Federal Practice, Par. 0.142(5.-3.), P. 1501 (2nd ed. 1961). Admittedly, this holding in the case of foreign corporations, goes a long way toward making the standards regarding venue coincident with those regarding in personam jurisdiction. Yet, Congress in exacting Section 1391 (c) clearly was striving toward this very end."

Moore, in Volume 1, Paragraph 0.142 (5.-3.), on page 1499, says:

"We believe that the construction of Section 1391 (c) involves a Federal matter; that state law is not controlling; and uniformity in applying Section 1391 (c) is desirable. And, although the matter is not free from doubt, and there is very respectable contra authority, we believe that if a corporation is amenable to service of process it should be held to be 'doing business' for venue purposes."

In Farmers Elevator Mutual Insurance Co. v. Austad and Sons,

Inc., 343 F. 2d 7, the Eight Circuit also quoted the L'Heureux case:

"We agree and are likewise in accord with the view that the purpose of Congress can be fully achieved only if foreign corporations--those that qualify and those which do not--can be sued in the federal court in actions arising out of business transacted in the state and district where the suit is filed. We believe and hold that Congress intended that the venue requirements of Section 1391 (c) are satisfied by showing that the defendant corporation was doing business in the district at the time the cause of action arose."

In Snyder v. Eastern Auto Distributors, 357 F. 2d, 552, the

Fourth Circuit held that withdrawal of the Defendant from the State did not dislodge venue, because the time at which it was to be doing business was the time when the cause of action arose. In the Snyder case the Fourth Circuit raised the point that "for a reasonable time" after a corporation ceased actually doing business, the venue should still remain where it had done business when the cause of action arose. The case of Sharp v. Commercial Solvent Corp., 232 F. Supp. 323, came to a like result, and again the Court said that venue would remain where the company had done

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No. 21947. ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

FRANK N. RAWLINGS,

Appellant,

v.

NATIONAL MOLASSES CO., a corporation; ORITA LAND
& CATTLE CORPORATION, a corporation; HEBER
CATTLE FEEDERS, a corporation; and ALLIED
CATTLE FEEDERS, a corporation,

Appellees.

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No. 21947

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK N. RAWLINGS,

Appellant,

v.

NATIONAL MOLASSES CO., A CORPORATION; ORITA
LAND & CATTLE CORPORATION, A CORPORATION;
HEBER CATTLE FEEDERS, A CORPORATION; AND
ALLIED CATTLE FEEDERS, A CORPORATION,

Appellees.

BRIEF FOR APPELLEES.

The appellant (Rawlings) has appealed from an interlocutory decision of the United States District Court for the Central District of California dismissing a supplemental complaint for failure to join a co-owner of a patent as an indispensable party. No opinion was filed, and the District Court's orders granting the defendants' motion to dismiss and denying the plaintiff's motion for a new trial appear at pages (R 526) and (R 571) ¹ of the record.

1. Every record citation with the suffix R refers to the record, every record citation with the suffix App. refers to Appellees' Appendix and every citation with the suffix R br. refers to Appellant's brief.

All emphasis in quotations throughout this brief is supplied unless otherwise noted.

COUNTER-STATEMENT OF THE CASE.

The Parties.

Plaintiff, Frank N. Rawlings (Rawlings), a resident of Caldwell, Idaho, is one of the co-patentees of U. S. Patent 2,748,001. The other co-patentee Philip C. Anderson is not a party to the suit, although his corporation, to whom he has assigned all of his interests in the patent, still has the right to grant as many licenses under the patent as it wishes, on whatever terms it pleases, and to keep all the proceeds.

Defendant, National Molasses Company (National), is a Delaware corporation whose principal business is the importation and sale of molasses. The co-defendants, Orita Land & Cattle Company, Heber Cattle Feeders, and Allied Cattle Feeders are customers of National.

Feed Service Corporation (Feed Service), is a Nebraska corporation, with its principal place of business located at Crete, Nebraska. It is the exclusive assignee of Anderson's undivided one-half interest in the subject patent and for this reason, was found to be an indispensable party by the District Court. Anderson is the president of the company. Although Feed Service is not a party to this litigation, its president, Anderson, did consent to being deposed, and the company did appear specially to contest defendants' subsequent Rule 37 Motion which sought an order compelling Anderson to answer certain questions propounded at his deposition.

The Proceedings Below.

Rawlings brought this action on April 16, 1965 against National and the other co-defendants, charging infringement of the aforesaid patent.

When this action was originally filed, Feed Service was joined as a defendant because Rawlings recognized that it

was an indispensable party by virtue of its ownership of Anderson's interest in the patent. However, Feed Service was not served, and although it has participated to the extent already discussed, it has never entered an appearance and therefore is not now a party to these proceedings.

Feed Service clearly did not wish to become a party to these proceedings (App. 4-5a). Therefore, Rawlings, with Anderson's cooperation sought to disguise its co-owner—indispensable party status and thereby remove the necessity of its participation as a party litigant. This attempt took the form of a transaction dated December 27, 1965, evidenced by two documents entitled, a "Patent Assignment" and a "Patent License Grant" (R 332-5), executed, respectively, by Anderson and Rawlings. The patent assignment purportedly assigned all of Feed Service's "undivided one-half of the entire right, title and interest in and to said patents and each thereof, as well as the right to sue and recover for all past infringement thereof" to Rawlings. However, the contemporaneous patent license agreement, returned to Feed Service, for the life of the patents, "an unlimited, royalty free, non-exclusive, and non-cancellable right and license to make, use and sell the products and use the methods of said patents and each of them, and to sublicense others so to do" (R 334). Armed with these documents, Rawlings then filed an Amended and Supplemental Complaint which omitted Feed Service as a party (R 212-216).

In fact the two documents are completely sham, as proven by Anderson's deposition testimony given several months after the agreements were purportedly executed. The agreements state on their face that they were each executed on December 27, 1965 (R 333-334); yet at the commencement of Anderson's deposition on March 9, 1966 plaintiff's counsel represented that such agreements had not yet been reduced to writing (App. 1-2a):

“MR. MASON: Mr. Connolly, before we get started, I would like to make a statement on the record here.

“The parties here have negotiated a transaction by which Mr. Rawlings will become the owner of the entire right, title and interest in the patents. It was only discussed this morning. It has not been reduced to writing.

“I will send you a copy of the document.” . . .

This was later confirmed by Anderson that same day when he testified concerning the details of these agreements which as of that day, March 9, had not been “worked out” or “reduced to writing.” (App. 9a). For example, Anderson stated that Feed Service’s right to sublicense under the patent was one of “the details today that remained to be worked out before this assignment was reduced to writing” (R 545); yet the license agreement purportedly granted such an unlimited right to Feed Service on December 27, 1965. During his deposition Anderson also testified that the assignment was not even in existence (App. 11a):

“Q. And that this agreement is to be drafted shortly and you propose to sign it and expect him to; is that right?

“A. That is correct.”

But the assignment too was purportedly executed on December 27, 1965. On these facts, and the candid admission of counsel for Feed Service that Feed Service’s sole interest was to remove the necessity of its being a party to this litigation (App. 3b-4b), the District Court concluded that these documents were exchanged solely “to circumvent rule 19(a)”; that Feed Service continued to have “all the rights it had as a co-owner, including the right to grant sublicenses and retain the royalties” and was thus an indispensable party to these proceedings within the meaning of Rule 19(a) (R 526-7).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

1. Whether the District Court's order dismissing the complaint, but not the action, for failure to join an indispensable party, is a final judgment for purposes of appeal.

2. Whether the Court correctly held that a co-owner of a patent who supposedly assigned its interest in the patent, but in fact retained all the rights it held as a co-owner, including the unrestricted right to license the patent and retain all royalties therefrom, continued to be an indispensable party to a suit for infringement of the patent.

A R G U M E N T .

I. Rawlings' Appeal Should Be Dismissed Since the District Court's Order Was Not Final Under 28 U. S. C. § 1291.

The District Court's order dismissing the complaint is not a final judgment within the meaning of 28 U. S. C. § 1291 and thus is not appealable. Rule 41(b) of the Federal Rules of Civil Procedure specifically provides:

“—unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal* for lack of jurisdiction, for improper venue, or *for failure to join a party under Rule 19*, operates as an adjudication upon the merits.”

Thus, the dismissal is without prejudice to the plaintiff filing an amended or new complaint in this or some other forum which would rectify the joinder problem.

Furthermore, while the District Court dismissed the complaint, it did not dismiss the action. The order is thus not an appealable order for this additional reason. Time and again this court has held that an order which does not dismiss the action as well as the complaint is not a final judgment within the meaning of 28 U. S. C. § 1291 and is therefore not appealable. *Drown v. United States Pharmacopoeial Convention*, 198 F. 2d 470 (9 Cir. 1952); *Merritt-Chapman & Scott Corporation v. City of Seattle, Washington*, 281 F. 2d 896 (9 Cir. 1960); *M. Martinez v. Flores*, 299 F. 2d 888 (9 Cir. 1961). Indeed, it has dismissed such appeals on its own motion. *Bundy v. Gibson*, 295 F. 2d 62 (9 Cir. 1961).

Considered within the framework of the Federal Rules of Procedure, as well as the requirements of 28 U. S. C.

§ 1291 the District Court's order dismissing the complaint is not a final judgment and this fact, alone, requires that this appeal be dismissed.

II. The District Court Correctly Dismissed the Complaint on the Grounds That Plaintiff Failed to Join Feed Service as an Indispensable Party.

At the time suit was filed, Feed Service was a co-owner of the patent in suit, and, by Rawlings' own admission, an indispensable party to the litigation. However, Rawlings asserts that the simultaneous exchange of the alleged assignment and license transformed Feed Service into a bare licensee thus removing its mantle of indispensability. The District Court found on the facts that after the exchange of documents Feed Service "still has all the rights it had as co-owner" (R 526-7) and was thus an indispensable party within the meaning of Rule 19(a). Accordingly, it granted the defendants' motion to dismiss. The record provides undeniable support for the Court's decision.

A. The Alleged Exchange of Documents Between Rawlings and Feed Service Was a Sham Transaction.

The record shows that the assignment and license were completely sham—drafted for the sole purpose of disguising Feed Service's true interest in the patent to circumvent the requirements of Rule 19. It is clear that Feed Service never intended to give up the essential rights of ownership which it previously held as a co-owner of the patent. If it in fact executed these agreements it was only for the purpose of confusing the issue. Furthermore, the authenticity of these documents is completely refuted by Anderson's sworn testimony, Rawlings' self-serving affidavit statement that they "memorialize bona fide transac-

tions supported by mutual considerations'' (R 549) notwithstanding. This evidence was before the Court and unquestionably influenced its conclusions. We submit it demonstrates that the entire transaction represented by these two documents was wholly fictitious—that Rawlings and Feed Service remain co-owners in fact, exactly as shown on the face of the patent (R 337). Further, we submit that Rawlings' attempt to mislead the defendants with these documents is itself tantamount to an act of unclean hands calling for the sanctions traditionally imposed in such situations.

B. The Assignment and License Agreement Do Not Change Feed Service's Status as an Indispensable Party, Assuming They Are Entitled to Any Credibility.

Even if these documents are assumed to represent a legitimate transaction, they fail to modify the parties' rights in any substantive way. The undisputed facts show that under the alleged license Feed Service still retains the very incidents of ownership which it had as a co-owner when this suit was filed and it admittedly was an indispensable party. It still has the unrestricted right (a) to operate in any way under the patent, for the life of the patent, (b) to grant as many sublicenses thereunder as it wishes, on whatever terms it wishes, (c) to keep all income derived from such sublicenses and (d) to exercise all of these rights autonomous of any control or intervention by Rawlings (App. 10-11a). These rights are clearly the attributes of a co-owner as defined by 35 U. S. C. § 262:

“Joint owners of a patent may make, use or sell the patented invention without the consent of and without accounting to the other owner.”

Feed Services' rights in the patent under the alleged license agreement clearly fall within this statutory definition. As the District Court found, the effect of the assignment and license agreement considered together was that Feed Service possessed the same rights it had before those documents were shuffled between the parties—those of a co-owner. The fact that the document reconveying these rights to Feed Service is labeled a license is of no moment for it is the substantive terms of the instrument that control—and they return to Feed Service the essential incidents of ownership. *Waterman v. Mackenzie*, 138 U. S. 252, 256 (1891); *Watson v. United States*, 222 F. 2d 689, 691 (10 Cir. 1955).

Furthermore, the record is clear that Feed Service never intended to give up any of the essential rights of ownership which it held as co-owner of the patent. Its own counsel confirmed this fact. (Appendix 4-5a):

“Mr. Cifelli: . . . I was disturbed by Mr. Anderson's being put to the bother, time-consuming efforts, et cetera of having to give testimony in this case, and noted that since Feed Service Corporation was a nominal party defendant and assuming, without however deciding, that Feed Service Corporation was actually before the Court, which I frankly doubt, I attempted to find a way to be fair to both parties and which would reduce the burden of Mr. Anderson.

“And I conceived the idea of having Mr. Anderson assign Feed Service Corporations and/or his one-half interest—and I am not reading from my notes—in the patents in suit, in return for license from Rawlings on a royalty-free basis with the right to sublicense, and on Rawlings taking whatever action is necessary to remove Feed Service as a party immediately.

“The basis, I repeat, of my position is that Feed Service Corporation has no interest in the outcome and does not want to be put to any unnecessary expense.

“By relinquishing title, Feed Service Corporation then only becomes a witness and not a party.”

The parties may have actually hoped, by mere form, to excuse Anderson from the “bother, time-consuming efforts et cetera” of testifying—but it is clear they never intended to modify any of Feed Service’s substantive rights under the patent.

Rawlings argues that Feed Service has been reduced to a mere non-exclusive licensee, having “nothing more than the grant of authority to practice the invention” similar to “a simple easement” (R br. 5) because Feed Service no longer has a “right to exclude others from practicing the patented invention” (R br. 14, 20). This right he asserts is the hallmark of ownership. We know of no legal support for this assertion—and the statute (35 U. S. C. § 262) and decisions are to the contrary *Pennsalt Chemicals Corp. v. Dravo Corp.*, 240 F. Supp. 837 (E. D. Pa. 1965).² As a co-owner, Feed Service’s rights were non-exclusive—as were Rawlings’ rights. Clearly, Rawlings did not wish to convey greater rights to Feed Service than it originally had, simply to keep it out of a law suit. If anything the fact that the license is non-exclusive simply underscores the correctness of the District Court’s finding that the simultaneous exchange of documents did nothing to alter the existing rights of the parties in the patent. Furthermore, the fact remains that Feed Service retained its unlimited right to sublicense the patent on its own terms and keep all pay-

2. At pages 13 and 14 of his brief Rawlings cites a number of statutory provisions as authority for his argument that a licensee cannot exclude others from the patent monopoly unless his license is “exclusive to all or part of the United States”. None of the cited provisions support this proposition.

ments. Retention of this right alone gives Feed Service a sufficient interest in the patent to permit it to sue for its infringement. *J. A. Terteling & Sons v. Guy F. Atkinson Co.*, — F. Supp —, 145 U. S. P. Q. 314 (N. D. Cal. 1965).

We submit that, for the foregoing reasons, Feed Service's present rights in the patent are unquestionably those of a co-owner. *Bendix Aviation Corporation v. Kury*, 88 F. Supp. 243, 248 (E. D. N. Y. 1950); *Rainbow Rubber Co. v. Holtite Mfg. Co.*, 20 F. Supp. 913, 915 (D. Md. 1937); *Gibbs v. Emerson Electric Mfg. Co.*, 29 F. Supp. 810, 812 (W. D. Mo. 1939); 4 *Deller's Walker on Patents*, § 371 (2 Ed.) p. 469. As such, it is an indispensable party to these proceedings under Rule 19 since it certainly has an interest in these proceedings, and, as the judgment would not bind Feed Service, its absence will clearly leave defendants open to multiple litigation even if they should be successful. For these reasons, it has long been held that persons holding ownership interests in a patent are indispensable parties to a suit for infringement of that patent. *Rainbow Rubber Company v. Holtite Mfg. Co. Inc.*, *supra*; *Bendix Aviation Corporation v. Kury*, *supra*, *United States v. Washington Institute of Technology*, 138 F. 2d 25 (3 Cir. 1943); *Switzer Brothers, Inc. v. Byrne*, 242 F. 2d 909 (6 Cir. 1957); *Hurd v. Sheffield Steel Corp.* 181 F. 2d 269 (8 Cir. 1950); 3 *Moore's Federal Practice* 2nd Ed. par. 19.14 (2-1) pp. 2405-6. This has been so regardless of whether such persons have actually asserted a claim or not. Rawlings' attempt to limit Rule 19 to instances where a claim is actually asserted (R br. 10) is wholly lacking in both reason and support.

Finally, Rawlings' argument (R br. 13) that Feed Service would be bound by the judgment because it was invited to become a party to these proceedings is absolute nonsense. Although the language quoted from *Independent Wireless Telegraph Company v. Radio Corporation of*

America, 269 U. S. 459 (1926) would appear to be pertinent, an examination of the case reveals it is not. Further in instances where the same argument has been advanced, the case has been held to have no application to situations concerning co-owners of a patent. *Rainbow Rubber Co. v. Hol-tite Mfg. Co.*, *supra*, *Bendix Aviation Corporation v. Kury supra*. Nor, we submit could the court below have remedied Feed Services' absence by including appropriate protective clauses in the judgment as Rawlings' cavalierly suggests (App. Br. 11) because the Court had no jurisdiction over Feed Service. Equally untenable are Rawlings' unsupported assertions (R br. 5, 10) that dismissal would leave Rawlings without an adequate remedy for any alleged infringement. There is not the slightest suggestion in the record that Rawlings could not proceed in some other jurisdiction or take some other appropriate action to remedy his plight.

The newly amended Rule 19 does make the relief granted for failure to join an indispensable party discretionary with the District Court. However, where, as here, the record shows that defendants will be prejudiced by Feed Service's absence, which cannot be avoided by measures other than dismissal of the complaint, and the record is silent as to whether Feed Service's absence can be cured by suit in another forum or by some other means, it is clear that the complaint should be dismissed. *Channel Mastes Corp. v. J. F. D. Electronics Corp.*, 263 F. Supp. 7 (E. D. N. Y. 1967). The decision of the District Court was not only well within its discretion but completely correct and therefore should be sustained.

CONCLUSION.

For the foregoing reasons, Rawlings' appeal should be dismissed or the decision of the Court below dismissing the supplemental complaint should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES E. JONES.

APPENDIX A.

Excerpts of Deposition of Philip C. Anderson, March 9, 1966.

(4)*

Mr. Mason: Mr. Connolly, before we get started, I would like to make a statement on the record here.

The parties here have negotiated a transaction by which Mr. Rawlings will become the owner of the entire right, title and interest in the patents. It was only discussed this morning. It has not been reduced to writing.

I will send you a copy of the document. . . .

Mr. Connolly: That is the document to be signed?

Mr. Mason: No.

Mr. Connolly: In other words, you have an oral understanding, but as of the moment, until this document is completed, Mr. Anderson is owner of the half-interests in the two patents in suit, and Mr. Rawlings is the owner of the half-interests—is that the situation?

Mr. Mason: That appears in the pleadings as set up, but we have agreed, as I have stated just now—whether the patents stand that way right now or not——

Mr. Connolly: In other words, it is a question whether Mr. Anderson or his company,

(5)

Feed Service Corporation, relinquished the half-interest in both patents in suit as of a few minutes ago, during a meeting that he had with Mr. Rawlings before he arrived here, or whether he is still the owner of the half-interest?

* Figures in parentheses refer to page numbers of typewritten transcript.

2b *Excerpts of Deposition of Philip C. Anderson*

Mr. Mason: It was agreed it was to go into a document, but we just haven't had time to write it up and sign it.

Mr. Cifelli: May I make a comment?

The assignment of all Mr. Anderson's and/or Feed Service Corporation's interest in the patents in suit was agreed upon in principle months ago, a fact that I communicated on more than one occasion to Mr. Christensen of your office.

The discussions that were had this morning, Mr. Connolly, merely had to do with one or two minor matters.

So in point of fact and equity, Mr. Anderson and/or Feed Service Corporation have not been the owners of any interest in the patent for some time, in my judgment.

Consequently, as of the moment, it is my belief that Mr. Anderson and his company are not here as parties. Mr. Anderson is merely a witness.

(6)

All that remains to be done is to reduce to writing what has been agreed upon for some time.

For that reason, I would like to have everybody here understand that neither the presence of Mr. Anderson nor of myself in any way is to be construed as an appearance in this case.

Mr. Connolly: Apparently there is some difference of opinion as to when the title to the patents in suit was transferred from Mr. Anderson's company to Mr. Rawlings.

But I think Mr. Mason has stated his views, and you, Mr. Cifelli, have stated your views. They are in the record. And rather than going into the matter any further, we will let the record speak for itself, and during the course of Mr. Anderson's deposition, perhaps I can try to develop some of the facts that may permit the Court to decide what the situation is.

Mr. Mason: I think if you start in questioning along that line, you are merely playing on a fiction, just to do a little fishing. So I don't think you should do that.

There is no difference between Mr. Cifelli's version of this and—we have negotiated it.

* * *

(45)

Mr. Cifelli: Referring specifically to Exhibit 1-H for identification, a letter dated December 6, 1965 from Mr. Christensen addressed to me, informing me that National Molasses desired to take the deposition of Feed Service Corporation by its chief executive, Mr. Philip C. Anderson, I made some notes under date of December 17, 1965 to the effect that I was disturbed by Mr. Anderson's being put to the bother, time-consuming efforts, et cetera of having to give testimony in this case, and noted that since Feed Service Corporation was a nominal party defendant and assuming, without however deciding, that Feed Service Corporation was actually before the Court, which I frankly doubt, I attempted to find a way to be fair to both parties and which would reduce the burden of Mr. Anderson.

And I conceived the idea of having Mr. Anderson assign Feed Service Corporation's and/or his one-half interest—and I am not reading from my notes—in the patents in suit, in return for license from Rawlings on a royalty-free basis with the right to sublicense, and on Rawlings taking whatever action is necessary to

(46)

remove Feed Service as a party immediately.

The basis, I repeat, of my position is that Feed Service Corporation has no interest in the outcome and does not want to be put to any unnecessary expense.

4b *Excerpts of Deposition of Philip C. Anderson*

By relinquishing title, Feed Service Corporation then only becomes a witness and not a party.

This information was passed on to Mr. Christensen. I do not know the exact date, however.

Under date of December 20th, I called Mr. Stratton and I began to tell him about the idea, but he then informed me that he was on his way out as Rawlings' attorney.

The following day I spoke to Mr. Mason.

And on December 23rd, Mr. Mason advised me over the telephone that the proposal is acceptable.

He mentioned that it would take time for him to have the assignment and license prepared as well as substitution of attorney, and that he had to review the file since he was new and there was a considerable amount of matter to be studied.

He then informed me that he would file an amended complaint eliminating Feed Service

(47)

Corporation as a party.

I am sure Mr. Mason, being a good lawyer, said he would file a motion for an amended complaint.

My notes——

Mr. Connolly: May I suggest, Mr. Cifelli, if you will, that you confine yourself to the consideration that Mr. Anderson received for the contemplated assignment of the two patents in suit.

Mr. Cifelli: I have already stated that.

Mr. Connolly: Have you covered in full the consideration that Mr. Anderson was to receive?

Mr. Cifelli: I have.

Mr. Connolly: Then may I direct some questions to him about that consideration?

By Mr. Connolly:

Q. Mr. Anderson, you heard your counsel describe the consideration which you were to receive in return for the assignment by your corporation, Feed Service Corporation, of its half-interest in the two patents in suit. Isn't that so?

A. That is right.

Q. Is it your understanding that what your counsel stated as to the consideration covers everything

(48)

that you expected to receive from the assignment?

A. It does.

Q. Were the terms of this consideration previously discussed with you by anyone, or did you hear them——

A. The terms——

Q. —or did you hear them for the first time today in the meeting which took place just before you appeared to give your deposition?

A. I heard about them several days ago while I was out of the country—that is, after I came back from being out of the country for a prolonged period of time.

Q. Who told you of the consideration several days ago?

A. My counsel.

Q. May we agree that the first you heard of this consideration was several days ago?

Mr. Cifelli: I would like to interject at this point, because the witness's memory is faulty. I have here notes dated December 17, 1965 from which I will read verbatim.

“Conference, 31 minutes with P. C. A.”

Mr. Connolly: That is Anderson?

Mr. Cifelli: That is Philip C. Anderson.
(49)

Mr. Connolly: Would you mind stating where the conference occurred?

Mr. Cifelli: On the telephone.

It is not stated here, but I am willing to back that up with a witness.

Mr. Connolly: I will take your word.

Mr. Cifelli: Please note this is dated December 17th, which is after the letter dated December 6th from Mr. Christensen advising me that the deposition of Mr. Anderson was desired.

Mr. Connolly: Would you just read whatever you wish in the record?

Mr. Cifelli: "After full consideration, I was authorized to call Stratton and offer to assign FSC's or PCA's one-half interest in patents in suit in return for license from Rawlings on royalty-free basis with right to sublicense and on Rawlings' taking whatever action is necessary to remove FSC as a party immediately."

The Witness: That is correct.

By Mr. Connolly:

Q. Mr. Anderson, with your recollection refreshed by Mr. Cifelli's statement, is it now your belief that you first heard of the consideration for the assignment

(50)

from you or your corporation of the two patents in suit about December 17, 1965?

A. Yes. I didn't understand your former question.

Q. And at that time, as I understand it, you told Mr.

Cifelli that this consideration was satisfactory and that you were willing to proceed with the assignment?

A. I did.

Q. Is that right?

A. Yes.

Q. What were the details today that remained to be worked out before this assignment was reduced to writing?

A. There was a slight misunderstanding.

Q. What was?

A. Between myself and my counsel.

I asked for a right to use the patent and to sublicense it. My counsel assumed that I only wanted a single opportunity to sublicense, while I wished to have unlimited opportunity to sublicense.

This was the point which wasn't understood.

Q. How was that point worked out today just before you appeared to give your deposition?

A. The right, as I wished it, for unlimited right to sublicense was granted.

(51)

Q. By whom?

A. By Rawlings and his attorney.

Q. Then is it your understanding that as of the present time you are to receive for the assignment of the two patents in suit a free license to operate under those patents with an unrestricted right to grant as many sublicenses thereunder as you wish and on whatever terms you wish?

A. Yes.

Q. And are you to keep all of the income derived from such sublicenses?

A. I am.

Q. Are you to share any part of that income with Mr. Rawlings?

A. No.

Q. Are you to have the right to grant free licenses to others if you so desire?

A. Yes.

Q. Under either or both of the patents in suit?

A. I am.

Q. Did you have to consult with Mr. Rawlings before granting such licenses?

A. No.

Q. Then is it a fair statement that you have

(52)

carte blanche to license any and all people under any terms varying from a free license to any royalty whatever, without consulting with Mr. Rawlings, and retaining for your sole use whatever you obtain from each of such licenses?

A. That is correct.

Q. And is it your understanding that you are to retain such rights throughout the remaining lives of each of the patents in suit?

A. It is.

Q. Did Mr. Rawlings this morning consent to such a right on your part as consideration for the assignment which is now to be reduced to writing?

A. That is true.

Q. And it is your understanding that you and he are in complete accord; is that right?

A. That is right.

Q. And that this assignment is to be drafted shortly and you propose to sign it and expect him to; is that right?

A. That is correct.

Q. Have you previously granted any other individual or company a license or sublicense under either of the patents in suit?

(53)

A. Have I granted any previously? I have.

Q. Who are the licensees or sublicensees of the patents in question?

A. The National Distillers Corporation——

Q. Any others?

A. —of New York. That was the principal one.

And the only other one is the Talbot Carlson Company of Audubon, Iowa.

Q. Were each of those companies licensed under each of the patents in suit?

A. Certainly National Distillers was.

Q. Was the Talbot Company?

A. I think only one of the patents in suit.

Q. Which one?

A. The 001, the earliest one.

Q. But you are sure that National Distillers received a license under both patents in suit; is that right?

A. I think so.

Q. Did its license include any other patent or patent application?

A. It did.

Q. What other patent and patent application?

A. Other patents in the area of liquid feed which I own.

* * *

No. 21850 ✓

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC., XYZ Corporations
K through X and JOHN DOE I through X
Appellees.

**Opening Brief of Appellants, Alfred Romero and
Gloria J. Romero, Husband and Wife**

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No. 21850

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC., XYZ Corporations
K through X and JOHN DOE I through X
Appellees.

Opening Brief of Appellants, Alfred Romero and Gloria J. Romero, Husband and Wife

JURISDICTIONAL BASIS

Appellants are residents and citizens of the State of Arizona and Appellee is a citizen of the State of Texas and does not have its principal place of business in the State of Arizona and was doing business in the State of Nevada at the time the event complained of occurred. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00. Jurisdiction of the District Court of the United States for the State of Nevada in this matter is based upon the above facts alleged in plaintiff's complaint, Title 28, U.S.C. 1332.

The appeal is taken from the granting of a summary judgment of the District Court of the United States for the District of Nevada entered March 20, 1967. This Court has jurisdiction of appeals from all final decisions of District Courts of the United States, except where there is a direct appeal to the United States Supreme Court, Title 28, U.S.C. 1291 states that there is no direct review to United States Supreme Court available to appellant. Notice of Appeal from such judgment of the United States Court of Appeals for the Ninth Circuit was timely filed upon an appeal.

STATEMENT OF THE CASE

The complaint alleges that appellant, Alfred Romero, was employed in Arizona by Guy Apple Masonry Contractor, Inc., a citizen of Arizona, to work on a project in the State of Nevada, and that while so employed appellant was injured by reason of the negligence of Ten Eyck-Shaw, Inc. in that one of appellee's employees so negligently maintained, operated and controlled a certain elevator and equipment that the elevator in which appellant was riding fell violently to the ground with appellant sustaining injuries. To this complaint the appellees filed a Motion to Dismiss. A Response to the Motion to Dismiss was filed and a hearing held on November 21, 1966, the Motion to Dismiss was denied without prejudice to file a Motion For Summary Judgment. An Answer to the Complaint was filed on January 11, 1967 a Motion for Summary Judgment was filed by appellees. Response to the Motion for Summary Judgment was filed and summary judgment was granted in favor of the appellee and against the appellant on March 20, 1967 with Findings of Fact and Conclusions of Law being filed simultaneously.

QUESTIONS PRESENTED

When an employer, covered by the Arizona Workman's Compensation Act, hires an employee in the State of Arizona to do work in the State of Nevada, is the employee entitled to all benefits of the Arizona Statutes pertaining to the Workman's Compensation Act, even though such benefit would be prohibited under the State of Nevada's Workman's Compensation Act?

ARGUMENT ON THE QUESTION

The question before the Court is quite clear.

May an employee hired in Arizona to work in Nevada reap the benefits of the Arizona statute relating to the Workmen's Compensation Act?

There are numerous cases that touch on the question. The Appellants will attempt to set these forth in detail in an attempt to shed as much light as possible on the problem before the Court.

In *Bradford Electric Light Co. v. Clapper* (1932), 286 U.S. 145, 52 S. Ct. 571, a Vermont employer made a contract in Vermont with an employee, also a resident of Vermont, by which they accepted the Vermont Workmen's Compensation Act, which provided that injury or death of an employee suffered in Vermont or elsewhere during the course of his employment would be compensated for only as provided for by the Act, without recourse to actions based on tort. The employee died of an injury he received while casually working in New Hampshire. His administratrix brought an action in New Hampshire under the Workmen's Compensation Act of the state for damages by reason of his death, which was claimed to have been caused by employer's negligence. Judgment for plaintiff was reversed by the Supreme Court of the United States. The Court ruled the Vermont Statute was a defense to the employer against the

death action brought in New Hampshire, and that refusal to recognize such defense was a failure to give full faith and credit to the Vermont statute.

The scope of this ruling was materially restricted by the Court's subsequent decisions in *Alaska Packer's Association v. Industrial Accident Commission* (1935), 294 U.S. 532, 55 S. Ct. 518, and *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939), 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940. In these cases the Supreme Court stated that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce the law of another state, in contravention of its own statutes or policy. Where the policy of one state's statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests is apparent, and the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. The Court stated that full faith and credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequence of the acts within it.

In *Pacific Employers Insurance Co.* (supra) an employee of a Massachusetts corporation, resided in Massachusetts and regularly employed in that state under a contract of employment entered into there, was injured in the course of his employment while temporarily in California. The Massachusetts Workmen's Compensation statute purported to give an exclusive remedy, even though the injury was incurred outside the state. The Supreme Court of California

in *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1938), 10 Cal. 2d 567, 75 P.2d 1058, affirmed a lower court ruling which refused to set aside an award of compensation to the employee by the California Industrial Accident Commission. The Supreme Court of California affirmed, holding that the Courts of California were not bound by the full faith and credit clause to apply, contrary to the policy of the state, the Massachusetts statutes or to recognize it as a defense to the claim of the employee under the Workmen's Compensation Statute of California. It pointed out that the California Act was in conflict with the Massachusetts Act, and stated at 75 P.2d 1073:

"It would be obnoxious to that policy (California's) to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons."

The opinion from the Supreme Court of the United States in the *Pacific Employers* case summarized the ruling of the *Clapper* case as follows: *Pacific Employers Insurance Co. v. Industrial Accident Comm.* (1939), 306 U.S. 483, 504, 59 S. Ct. 629, 634:

"The *Clapper* case can not be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment, while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy."

It distinguished the *Clapper* case by pointing out that there was nothing in the New Hampshire statute, the decisions of its courts, or in the circumstances of the case, to

suggest that reliance on the provisions of the Vermont statute, as a defense to the New Hampshire suit, was obnoxious to the policy of New Hampshire.

While the Clapper decision has been diluted by later cases dealing with Workmen's compensation, there is nothing in the later cases to give support to the proposition that full faith and credit must give way to a local policy not embodied in a statute which directly governs the cause of action. Thus full faith and credit would lean to application of Arizona law.

In *Hughes v. Fetter* (1951), 341 U.S. 609, 71 S. Ct. 980, plaintiff brought an action in Wisconsin based on Illinois's wrongful death statute. Accident had occurred in Illinois; defendant was apparently a resident of Wisconsin. State Court held that the Wisconsin statute, which created a right of action only for deaths caused in that state established a local public policy against Wisconsin's entertaining suit brought under the wrongful death acts of other states. Held: Construing local statute thus violates full faith and credit clause, Article IV, Section 1. (Quoting from the case, 341 U.S. 611, 71 S. Ct. 982):

"We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal however, is as follows: On the one hand is the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each state of the obligations created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin as interpreted by its highest court,

against permitting Wisconsin courts to entertain this wrongful death action."

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general."

In *Carroll v. Lanza* (1955), 349 U.S. 408, 75 S. Ct. 804, the Supreme Court of the United States held that the Federal Constitution, Article IV, Section 1, does not require the state of the forum to recognize the exclusive remedy provisions of the Workmen's Compensation statute of another state, and that the state of the forum may permit a tort recovery by an injured employee even though a tort action by him would be prohibited by the Workmen's Compensation statute of the state where he was employed. The effect of this decision which reversed the contrary holding of the Court of Appeals for this circuit was to reinstate the original decision of the court. In the original opinion in *Carroll v. Lanza* (1953), 116 F. Supp. 491 at 502, the following was stated:

"The rule now seems to be that any state having a substantial connection with the employee-employer relationship may apply its own Workmen's Compensation Act. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476, 67 S. Ct. 801, 91 L. Ed. 1028. See also *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140. (Permitting recovery under both the Illinois and the Wisconsin Acts.) And, a state having the right to apply its own Workmen's Compensation Act would also have the right to apply its own third party practice. See. Vol. 2, *Larson's Workmen's Compensation Law*, Section 88.23, P. 407."

It appears that for all practical purposes *Lanza* overruled the earlier decision in *Bradford Electric Light Co. v.*

Clapper (1932), 286 U.S. 145, 52 S. Ct. 571, and that under the *Carroll v. Lanza* rule, the place of injury clearly has power to grant a tort recovery under its own law even though the place of contract or other place creating compensation rights would say that no tort right exists.

The facts in *Carroll v. Lanza* (1955), 349 U.S. 408, 75 S. Ct. 804, were as follows:

Carroll was employed by Hogan. Both Carroll and Hogan were residents of Missouri, and the employment contract was made in Missouri. Hogan was a subcontractor for Lanza in Arkansas. While Carroll was working for Hogan on a job for Lanza, Carroll was injured. He was not aware that he had remedies under Arkansas law so he received payment from Missouri. The Missouri compensation act is applicable to injuries received outside the state where the contract of employment is made in Missouri. The Act provides that the remedies granted by it exclude all of the common law rights and remedies. The Arkansas Act says workmen's compensation is the exclusive remedy against employer (here Hogan) but not against a third party (here Lanza). Carroll decided to sue Lanza for damages in Arkansas. Lanza had the suit removed to Federal Court. Judgment for Carroll under Arkansas law. The Court of Appeals felt that the full faith and credit clause barred recovery. Held: Judgment reversed. Carroll was entitled to sue under Arkansas law. Home state remedy was not exclusive.

In *Crider v. Zurich Insurance Co.* (1965), 380 U.S. 39, 85 S. Ct. 769, Crider was a resident of Alabama and was employed there by Lawler, a Georgia corporation. Crider and Lawler were both under Georgia Workmen's Compensation when Crider was injured. Crider sued in Alabama under Georgia law and got default. Crider then

brought an action against Lawler's insurer in Federal District Court. Motion to dismiss granted and affirmed by Court of Appeals. Reversed. Held: Alabama Court could apply the Georgia Workmen's Compensation Act, at 380 U.S. 39, 41; 85 S. Ct. 769, 770:

"The state where the employee lives has perhaps even a larger concern (than the state where the tort occurs), for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt. * * *"

The Alabama policy in that regard is reflected in the judgment rendered by the Alabama Court on which the federal suit was instituted. That Alabama judgment adopted and enforced the remedy provided by Georgia, 380 U.S. 42, 85 S. Ct. 770:

"A procedure we indicated in *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939), 306 U.S. 439, 59 S. Ct. 629, a state might follow. Here, as in the *Alaska Packer's Association v. Industrial Accident Commission*, supra (1935), 294 U.S. 544, 55 S. Ct. 522."

It is felt that *Hughes v. Fetler* (1951), 341 U.S. 609, 71 S. Ct. 980, is of such significance to the present fact situation that the following quote could almost with some minor changes sum up the case before this Court. By inserting Nevada in place of Wisconsin it would hardly be distinguishable from *Romero v. Ten-Eyck Shaw*.

"The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the

statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally. The Wisconsin policy, moreover, cannot be considered as an application of the *forum non convenience* doctrine, whatever effect that doctrine might be given if its use resulted in denying enforcement of public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, we fear foregoing controversies to which nonresidents were parties, the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. We also think it relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant. And while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service, in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state.

"Under these circumstances, we conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the full faith and credit clause."

The *Clapper* case has in effect been overruled. What has been decided in the *Alaska, Pacific* and *Carroll* cases is not

that a forum state can ignore the Workmen's Compensation law of a sister state in every circumstance. What these cases hold—and to this extent overrule Clapper—is that when the sister state's Workmen's Compensation law is more restrictive in providing an injured employee redress, the forum state is free to follow its own law. But in our case it is the forum state (and not the sister state) whose law is more restrictive. Therefore, the results in those cases should be construed in favor of appellant.

There is no restriction concerning more than one statute applying to a single compensable injury so long as each state has a relevant interest in the case. Actually, the present fact situation is merely a successive award. *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 662, 67 S. Ct. 886. The *McCartin* case, one of the landmark cases, was a fact situation wherein an Illinois resident had made a contract of employment with an Illinois employer in Illinois, pursuant to which he did some work in Wisconsin, in the course of which he was injured. He began compensation proceedings in both states. While the Wisconsin proceedings were pending, the Illinois commission issued a formal order approving a settlement agreement under Illinois law, and full payment was made under the order.

The Supreme Court of the United States, by unanimous vote, reinstated the Wisconsin award. Since the vast majority of compensation laws resemble the Illinois law in this respect, the decision has been taken to mean that for all practical purposes successive awards are sanctioned.

The crucial paragraph of the *McCartin* opinion, setting forth the reason for its conclusion is sufficiently important to warrant quotation in full. The Court first quotes the Illinois exclusive-coverage clause and shows that it means in Illinois (as it does in practically every other state) that

it is exclusive only in the sense that no other common law or statutory remedy *under local law* can be sought. The Court then goes on to say: 330 U.S. 627, 67 S. Ct. 889,

“But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. (Citing cases.) And in light of the rule that workmen’s compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, (citing cases.) And in light of the rule that workmen’s compensation as to cut off an employee’s right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. (Citing cases.)

“We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen’s Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state....”

The reasoning set forth by the District Court in its decision to the effect that the Arizona employer could have requested an exemption under the Nevada Compensation Act should have no more weight than the fact than an express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state’s statute or to diminish the applicability of the statutes of other states. Whatever the rule may be as to questions involving commercial paper, interest, usury and the like, the rule in workmen’s compensation is dictated by the overriding consideration that com-

pensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements. This is most obvious when such an agreement purports to destroy jurisdiction where it otherwise exists; *Alaska Packers Association v. Industrial Accident Commission* (1935), 294 U.S. 532, 55 S. Ct. 518; practically every statute has emphatic prohibitions against cutting down rights or benefits by contract. The only exception occurs under several statutes which explicitly permit the parties to agree that the local statute shall not apply to out-of-state injuries. Alabama, Kansas, Kentucky, Missouri, and Tennessee.

And this is no less true in the instant fact situation since the employee for all practical purposes is not made aware of whether or not his employer is or is not filing or requesting an exemption under the Nevada statute.

It is submitted that the present appeal should in essence be controlled by the reasoning in *Miller v. Yellow Cab Co.* (1941), 308 Ill. App. 217, 31 N.E.2d 406. In the *Miller* case the plaintiff was a Texas employee of a Texas employer and had been injured during a temporary business errand in Illinois. Texas permits suits against any third party, while Illinois has the most restrictive kind of third-party statute, prohibiting suit by the employee against any third person who himself is under the Illinois compensation act. Illinois allowed the suit, on the ground that third-party rights are fixed by the law of the state granting compensation. The court also apparently assumed that Illinois would not have awarded compensation if an award had been sought under the Illinois Act; and therefore, Illinois Compensation provisions did not come into play at all.

It is submitted that the whole idea and philosophy of compensation legislation is to prevent the throwing of an injured workman on local charity, and therefore, the State of Arizona has a highly relevant interest in forestalling that

event; thus the State of Nevada must give full faith and credit to the cause of action against the negligent third party. Certainly if the situation were reversed the State of Arizona would give full faith and credit to the Nevada statutes, for A. R. S. 23-904 is quite clear.

“A. If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state.

“B. If a workman who has been hired without this state is injured while engaged in his employer’s business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state.” A. R. S. 23-904.

WHEREFORE, it is submitted that the decision of the Federal District Court for the State of Nevada be overruled and the case sent back for appropriate proceedings.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAWRENCE OLLASON

No. 21850

In the

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO and GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC., XYZ CORPORATIONS
K through X and JOHN DOE I through
X,
Appellees.

Opening Brief of Appellee Ten Eyck-Shaw, Inc.

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In the

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TEN EYCK-SHAW, INC., XYZ CORPORATIONS
K through X and JOHN DOE I through
X,
Appellees.

Opening Brief of Appellee Ten Eyck-Shaw, Inc.

JURISDICTIONAL BASIS

Jurisdiction is based on allegations of Appellants' Complaint and 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellee objects to the Appellants' Statement of the Case in that it omits certain pertinent facts essential to a full and accurate statement and, therefore, presents this additional statement.

Ten Eyck-Shaw, Inc., a Texas corporation, entered into a contract for the construction of a bank and garage building in Las Vegas, Clark County, Nevada, in June, 1964 (R. 40, 41, 42, 43, 44, 46 and 47). Ten Eyck-Shaw, Inc., as principal contractor, employed Guy Apple Masonry Contractors, Inc., an Arizona corporation, as subcontractor to perform certain construction work on said construction contract in Las Vegas, Clark County, Nevada (R. 49, 50 and 51). Guy Apple Masonry Contractors, Inc., subcontractor, hired Alfred Romero to perform certain work on said construction contract in Las Vegas, Clark County, Nevada (R. 53 and 54). Alfred Romero had previously worked on a construction project for Guy Apple Masonry Contractors, Inc. in Arizona, and states in his affidavit that he was hired in Arizona (R. 85), but Guy Apple, President of Guy Apple Masonry Contractors, Inc., states in his affidavit that Alfred Romero came to Las Vegas, Nevada at his own expense seeking employment on the Las Vegas construction and was hired in Las Vegas. All of the work on the construction project under Ten Eyck-Shaw, Inc., principal contractor, was performed in Las Vegas, Clark County, Nevada, and Alfred Romero was employed in Las Vegas, Clark County, Nevada from June, 1964 through September 30, 1965 (R. 53-54).

Ten Eyck-Shaw, Inc., as principal contractor, and Guy Apple Masonry Contractors, Inc., as subcontractor, elected to accept and did come within the provisions of the Nevada Industrial Insurance Act, NRS 616 (R. 35, 36, 38, 52 and 54). Neither Guy Apple Masonry Contractors, Inc. nor Alfred Romero ever filed with the Commission any rejection of the Nevada Industrial Insurance Act. Alfred Romero filed a claim with the Nevada Industrial Commission for injuries both on June 27, 1965 and on March 24, 1965, and elected to and did take the sum of \$6,184.67 as medical benefits and compensation which the Nevada Industrial Commission found was due him by reason of the fact that his injuries arose out of and in the performance of his employment in Las Vegas, Nevada (R. 36). Appellants admit Nevada statutes prohibit this action by a subcontractor's employee against the principal contractor (Opening Brief, p. 3).

QUESTION PRESENTED

Whether the record supports the Summary Judgment for the principal contractor and statutory employer when the Nevada statute bars a personal injury action against the principal contractor by a subcontractor's employee who accepted and received medical benefits and compensation under the Nevada Industrial Insurance Act?

ARGUMENT ON THE QUESTION

The District Court Properly Held That the Defendant-Appellee is Entitled to Summary Judgment as a Matter of Law (R. 88) and Concluded:

"This Court believes that the Nevada statute governs here and that this would be true whether this action was commenced against the Defendant in Arizona or Nevada, in the State or Federal Courts. The Arizona Workmen's Compensation Act has no application to

this action. *Williamson v. Weyerhaeuser Timber Company*, 9 Cir., 1955, 221 F.2d 5; *Home Indemnity Company of New York v. Poladian*, 4 Cir., 1959, 270 F.2d 156; *Simon Service Incorporated v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957); *Titanium Metals Corp. of Amer. v. Eighth Judicial Dist. Ct.*, 76 Nev. 72, 75, 349 P.2d 444 (1960)." (R. 93).

A. Introduction.

Appellants admit this action is barred by Nevada law, but they say, in effect, "Disregard Nevada law, because I'm from Arizona where I was covered by the Arizona Workmen's Compensation Act in 1964 when I worked in Arizona for the subcontractor. I think the subcontractor hired me in Arizona to go to Las Vegas, Nevada and work on the bank construction job in Las Vegas, so Arizona law gives me the right to sue the principal contractor for injuries in 1965 which occurred in Las Vegas, Nevada even though I elected to and did receive medical benefits and compensation from the Nevada Industrial Commission. I can reap all the benefits of the Nevada Industrial Insurance Act, and because I am from Arizona, I can disregard the Nevada statutory prohibition against suing the principal contractor, ignore his statutory defense and any protection Nevada gives him."

Appellants' contention would lead to all of the consequences which Nevada's workmen's compensation laws were designed to avoid. Application of Appellants' novel proposition would cause an undue burden on the principal contractor on a construction job employing five hundred employees. The principal contractor would have to investigate the hiring of each employee on the job, question the former residence and any subcontractor relationship of each employee, and examine the laws of the other forty-nine

states to whose vagaries he might become subject. Under the Appellants' proposal of subserviency from the state of the injury, Nevada would be powerless to provide any protection to the principal contractor within its borders by fixing a liability which is limited and determinate.

B. Arizona Workmen's Compensation Act Has No Application Against an Employer in Nevada for an Injury Which Occurred in the Course of Employment in Nevada.

This Court, in *Williamson v. Weyerhaeuser Timber Company* (1955) 221 F.2d 5, held that if an employee employed by an Oregon corporation and killed in Washington by a Timber Company's truck while inspecting tractors sold by the employer to Timber Company, was covered by Washington Workmen's Compensation Act, widows' wrongful death action brought in Federal Court in Oregon against Timber Company would be barred under Washington Workmen's Compensation Act even though Workmen's Compensation Act allows employees who are injured through negligence of a third party to elect whether to take under the Workmen's Compensation Act or recover damages from the third person.

This Court, at pp. 11, 12, said:

"Manifestly if the law of Washington says no cause of action arose, no Oregon court could by application of any rule of the State of Oregon make the conduct here complained of actionable. As stated by Mr. Justice Holmes in *American Banana Company v. United Fruit Company*, 213 U.S. 347, 356, 29 S.Ct. 511, 513, 53 L. Ed. 826, 'But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations,

which the other state concerned justly might resent.’
 * * * The basic question before the trial court was whether an actionable tort had been committed in the State of Washington. As stated by Mr. Beale, ‘If by the law of the place where the defendant caused an event to happen this event created no right of action in tort, no action can be brought on account of the event in another state although it would create a cause of action by the law of that other state: whether by the common law or by a statute.’ 2 Beal, Conflict of Laws, § 378.4” This Court succinctly summarized, at p. 12:

“No interest which Oregon had in Williamson as its citizen would permit that state to arm him with a body of Oregon law which he could carry about as he went into the State of Washington. Much less could it impose upon the timber company, as it carried on its Washington operations, some rule of liability evolved from Oregon legislative policy. Wholly apart from the power of Oregon to project a rule of civil liability of its own making into the State of Washington, it is plain that it has not undertaken to do so.”

In the Fourth Circuit, in *Home Indemnity Company of New York v. Poladian* (1959), 270 F.2d 156, the Court held that where an injured employee, a District of Columbia resident, worked for direct employer who was also a District of Columbia resident on a job in Virginia for contractor, a Virginia resident, and employee was injured on such job and elected to recover compensation in District of Columbia which did not bar common-law actions for negligence, law of Virginia barring common-law actions of negligence to injured workman and providing for workmen’s compensation in lieu thereof was controlling in direct employer’s insurance carrier’s action against insurance carrier for Virginia contractor to recover com-

pensation paid and payable to injured employee. The Court stated, at p. 158:

“The well established general rule is that in an action for negligence the law of the locality where the negligence occurred controls. Ordinarily, in determining whether an actionable tort has been committed in Virginia we look to its laws, for it is within Virginia’s competence to take away the common-law right of action if it deems it more just to award fixed compensation irrespective of negligence. In three Federal Circuits this rule has been applied in bar of common law actions in situations similar to this. *Jonathan Woodner Co. v. Mather*, 1954, 93 U.S. App. D.C. 234, 210 F.2d 868, certiorari denied 1954, 348 U.S. 824, 75 S.Ct. 39, 99 L.Ed. 650; *Williamson v. Weyerhaeuser Timber Co.*, 9 Cir., 1955, 221 F.2d 5; *Bagnet v. Springfield Sand & Tile Co.*, 1 Cir., 1944, 144 F.2d 65 Certiorari denied 1944, 323 U.S. 735, 65 S.Ct. 72, 89 L.Ed. 589.

Directly in point is Restatement, Conflict of Laws, § 401 (1948 Supp.) which declares:

‘If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a Workmen’s Compensation Act of the place of wrong, no action can be maintained for such tort or wrongful death in any State.’”

The Court continued at p. 159:

“Applying the principle of the federal cases, as we have seen, the plaintiff cannot prevail here because the state where the injury occurred, Virginia, has abolished the common-law remedy against one who is subject to its Workmen’s Compensation Law and has complied with its insurance provisions. If, on the other hand, we were to adopt the employment relationship concept of the *Wilson* case, the factual context here presented still requires us to enforce Virginia law.

For in the instance case the general contractor does not reside or do business in the District of Columbia, and has no direct connection with that jurisdiction. If a state's contact with the various aspects of the employment relationship is to control the choice of law, then even under Wilson it would hardly be permissible to subject the general contractor to the law of a jurisdiction with which he is in no way connected, simply because the subcontractor and the plaintiff-employee have contacts there.

No reason occurs to us for saying that when action against a general contractor by a subcontractor's injured employee is barred by the law of the state where the injury occurred, the employee may at his option remove the bar by accepting an award of compensation from the subcontractor in another state. The relationship between the workman and his immediate employer may in respect to rights *inter sese* be governed by the state where they reside and where compensation has been provided and paid, but the general contractor, residing and operating in another state, is ordinarily governed by the laws of that state. He remains subject to the obligations of these laws and is entitled to the benefits that accrue to him from compliance.

Nor can the fact that the employee has chosen not to avail himself of the remedy provided by the Virginia statute lessen the protection it affords the general contractor. The applicability of the Act is determined when the employee enters upon the work in Virginia and the general contractor, as statutory employer, complies with the Act's requirements. *Sykes v. Stone & Webster Engineering Corp.*, 1947, 186 Va. 116, 41 S.E.2d 469; *Doane v. E. I. DuPont de Nemours & Co.*, 4 Cir. 1954, 209 F.2d 921. This cannot be changed by the actions of the employee or employer after the accident."

This Court, in *Williamson v. Weyerhaeuser Timber Company*, *supra*, 221 F.2d at 11, 12, 13 and 14, considered the

applicability of all the cases discussed in Appellants' Opening Brief, except *Crider v. Zurich Ins. Co.* (1965), 380 U.S. 39, 85 S.Ct. 769 (App. Op. Br. p. 8, 9), *Hughes v. Fetler* (1951), 341 U.S. 609, 71 S.Ct. 980, 257 Wis. 35, 42 N.W.2d 452 (App. Op. Br. p. 6, 9), and *Miller v. Yellow Cab Co.* (1941), 308 Ill. App. 217, 31 N.E.2d 406 (App. Op. Br. 13).

Crider v. Zurich Ins. Co., supra, was concerned with whether Georgia's provisions for primary jurisdiction in an administrative board precluded original court jurisdiction. Appellants rely heavily upon *Hughes v. Fetler*, supra, which involved a wrongful death action by a citizen of Wisconsin against another citizen of Wisconsin and an insurance company incorporated in Wisconsin for the death of a Wisconsin citizen in an Illinois automobile accident. Wisconsin did have a wrongful death act for a death caused in the State of Wisconsin, and the Court held Wisconsin should also entertain an action for wrongful death in another state. *Miller v. Yellow Cab Co.*, supra, allowed the prosecution of an action by an employee, hired, residing, employed in Texas, temporarily in Chicago, where he was injured while riding in a Yellow Cab on Texas company business, to sue Yellow Cab Co. as a third party tort-feasor. The rationale of the cases cited by Appellants are clearly distinguishable from the issues raised here.

C. The Nevada Law Bars an Action for Personal Injury by an Employee of a Subcontractor Against the Principal Contractor when the Principal Contractor and Subcontractor Elected to and Did Come Within the Provisions of the Nevada Industrial Insurance Act, NRS 616 and the Employee Elected to and Did Receive Benefits Under the Nevada Industrial Insurance Act.

The Nevada Industrial Insurance Act provides:

NRS 616.085 "Employee and workman": Subcontractors and employees. Subcontractors and their employees shall be deemed to be employees of the principal contractor.

NRS 616.090 "Employer" defined. "Employer" shall be construed to mean.

1. The state, and each county, city, school district, and all public and quasi-public corporations therein.

2. Every person, firm, voluntary association, and private corporation, including any public service corporation, which has any natural person in service.

3. The legal representative of any deceased employer.

NRS 616.105 "Independent contractor" defined. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished.

NRS 616.115 "Subcontractors" defined. "Subcontractors" shall include independent contractors.

NRS 616.260 Exemption of Employer and workman temporarily within state.

1. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this chapter while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance act or similar laws of a state other than Nevada so as to cover such employee's employment while in this state, provided:

(a) The extraterritorial provisions of this chapter are recognized in such other state; and

(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of such other state.

The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injuries, whether resulting in death or not, received

by such employee while working for such employer in this state.

2. A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extra-territorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carried such industrial insurance.

NRS 616.270 Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter, and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided.

NRS 616.370 Rights and remedies conclusive and obligatory on employers and employees.

1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.

2. The terms, conditions and provisions of this chapter for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and em-

ployees coming within the provisions of this chapter. The Court below pointed out that:

“If, as plaintiff contends, the masonry subcontractor had complied with and was in good standing under the Arizona Act and had brought some twenty employees, including plaintiff, to Nevada for the bank job, the masonry subcontractor could have become exempt from the Nevada Act under NRS 616.260 (R.91).” The Court further noted that the masonry subcontractor did not seek such exemption but, on the contrary, fully complied with the Nevada Industrial Act, as had the defendant, the general contractor (R.92).

Regardless of whether or not the subcontractor hired the employee in Arizona or Nevada, the provisions of the Arizona Workmen’s Compensation Act cannot give the employee a cause of action in Nevada against the principal contractor and statutory employer in Nevada, for an injury which occurred in the course of employment in Nevada, which cause of action the State of Nevada has abolished by the enactment of Nevada Revised Statutes Chapter 616.

The decisions of the Nevada Supreme Court specifically hold that an employee of a subcontractor has no common law action for injuries sustained in the course of his employment against the principal contractor.

In *Simon Service Incorporated v. Mitchell*, 73 Nev. 9, 307 P.2d 110, defendant in constructing a building, entered into various separate contracts, and the Court held that the fact that defendant was the “general contractor” or “principal employer” would preclude one contractor’s employee, who suffered injuries in the course of his employment and accepted benefits of the Industrial Insurance Act, from recovering at common law from defendant for the injuries sustained.

The Court stated in *Titanium Metals v. District Court*, 76 Nev. 72, 75, 349 P.2d 444: “We conclude that the said con-

tract and affidavit bring this case squarely under the ruling in *Simon Service v. Mitchell*, 73 Nev. 9, 307 P.2d 110. There this Court held that where a defendant owner, in constructing a building, entered into separate contracts, the fact that defendant was a general contractor or principal employer would preclude an employee of another contractor who suffered injuries in the course of his employment and accepted benefits under the Industrial Insurance Act from recovering at common law from defendant for the injuries sustained."

Subsequent Nevada District Court decisions are clear that an employee of a subcontractor has no course of action against the principal contractor.

In *Carmie R. Jacobson v. Ten Eyck-Shaw, Inc.*, a Texas corporation qualified to do business in Nevada, Case No. A 23660, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the undersigned brought a Motion for Summary Judgment in February, 1967 on behalf of Ten Eyck-Shaw, Inc. against the plaintiff employee of a subcontractor, Las Vegas Machine, Inc., on the grounds that Ten Eyck-Shaw, Inc. was the principal contractor and employer who had complied with the provisions of the Nevada Industrial Insurance Act and that the plaintiff employee elected to and did receive the benefits of the provisions of the Nevada Industrial Insurance Act, and had no right to institute legal action against the defendant. The Court granted the Motion for Summary Judgment on the 24th day of February, 1967 and no appeal has been taken therefrom.

An Order Granting Motion for Summary Judgment was entered January 20, 1967 against the plaintiff employee in *Robert Osborn and Queenie Mae Osborn, Husband and Wife, v. Southwest Gas Corporation*, a California corpora-

tion, *Elda J. Pruitt and Willie Kennedy*, Case No. A 23732, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. Therein the employee of a subcontractor, and his wife, sued the principal contractor and two of the principal contractor's employees. No appeal has been taken therefrom. In *James E. Walsh v. McDonald Engineering Co. of California*, Case No. A 10557, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the plaintiff was an employee of one of the subcontractors and brought an action for injuries against another subcontractor for the injuries sustained. Summary Judgment against the plaintiff was granted, January 7, 1966, and no appeal has been taken therefrom.

CONCLUSION

The principal contractor is an employer within the provisions of the Nevada Industrial Insurance Act, and Appellant was an employee working in the scope of his employment at the time of his injury. Employee's sole and exclusive remedy under the laws of the State of the employment and injury, Nevada, is under the provisions of the Nevada Industrial Insurance Act, under which provisions employee elected to and did receive benefits. Appellants have no common law action against the principal contractor and employer, the provisions of the Nevada Industrial Insurance Act being exclusive of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury. The Arizona Workmen's Compensation Act creates no new cause of action in Nevada for an employee whose statutory employer complied with the provisions of the Nevada Industrial Insurance Act and is entitled to its protection, the statutory employer and principal

contractor never having been under the legislative control of the State of Arizona.

For the reasons stated here, it is respectfully submitted that the District Court's Summary Judgment be affirmed.

MORSE & GRAVES

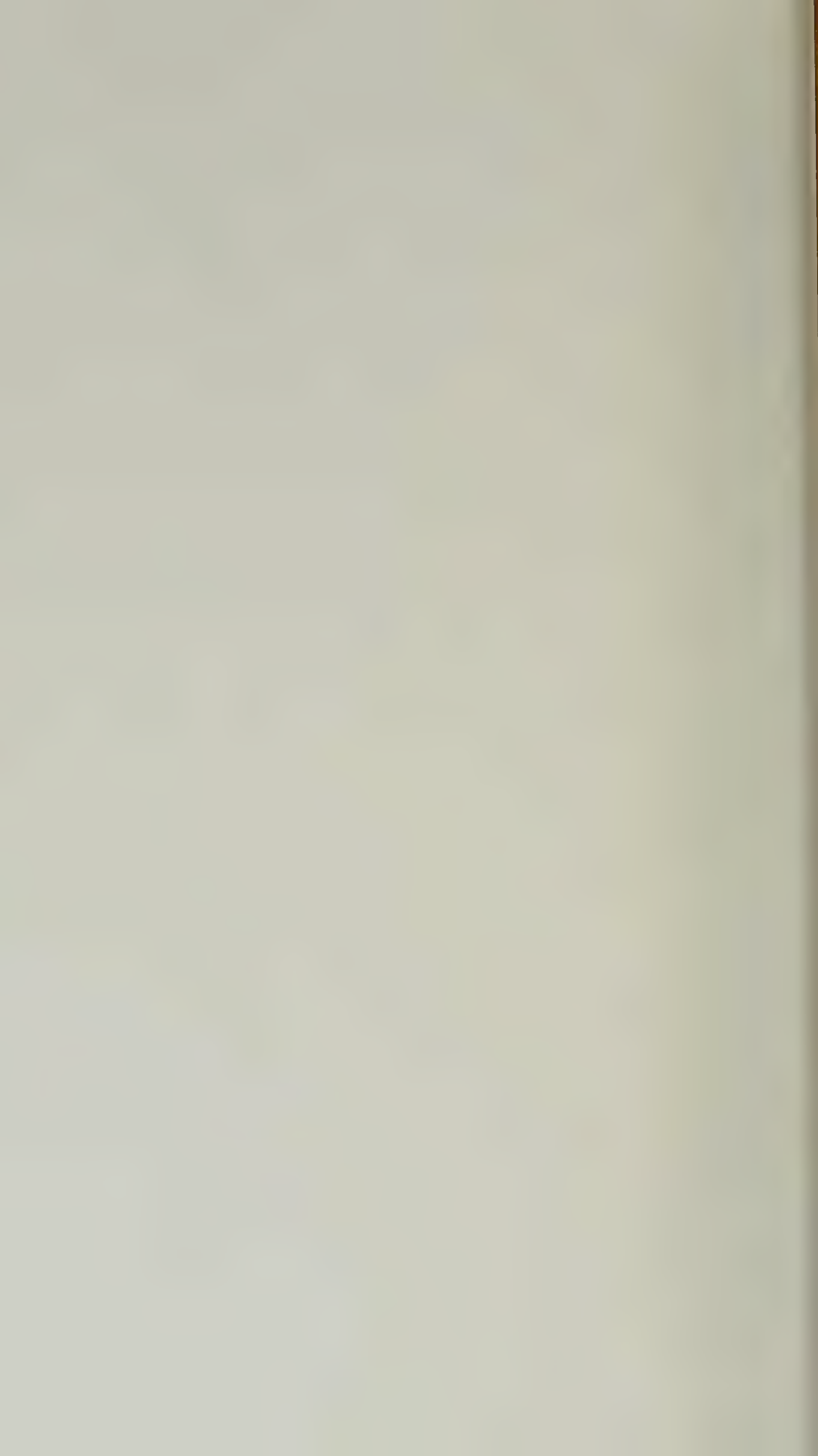
By DERELLE L. NORWOOD

Attorneys for Appellee

CERTIFICATE

The undersigned certifies that she has examined the provisions of Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in her opinion the tendered brief conforms to all requirements.

DERELLE L. NORWOOD



No. 21850

United States Court of Appeals
For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC.,
Appellee.

Petition for Rehearing

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Attorneys for Appellants

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,	}
<i>Appellants,</i>	

VS.

TEN EYCK-SHAW, INC.,	}
<i>Appellee.</i>	

Petition for Rehearing

Appellants petition the Court for a rehearing on this matter on the ground that the Court has overlooked or misapprehended the major import of appellant's argument and the authority cited in support thereof.

The Court has based its decision affirming a summary judgment against appellants upon its determination that Nevada law applies to the case and that the application of such law precludes the maintenance of this action. On page 2 of its opinion, this Court said (in the first full paragraph), "Therefore, if Nevada law is applicable, Romero has no cause of action against Ten Eyck." The Court then decided that Nevada law was in fact applicable and it followed from there to the conclusion that Romero has no cause of action.

Appellants concede for the purpose of argument only that this is a case in which either Nevada or Arizona law could have been properly applied because there has never been a firm choice of law rule established by the Supreme Court and the full faith and credit clause of the U.S. Constitution is not so inflexible as to preclude the application of either law. But, appellants contend that the question involved in this case does not present a conflict of laws problem so much as it presents a problem of interpretation and construction of statutes. It is the position of appellants that it makes no difference whether the Court applies the law of Arizona or Nevada, this action is maintainable and appellee's motion for summary judgment should have been denied. It is this point which appellant believes the Court overlooked because it was not mentioned in the Court's opinion.

Appellant's point was illustrated on pages 4 and 5 of appellant's opening brief in the case of *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939), 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940, which held that the California Industrial Accident Commission could properly make an award to a Massachusetts workman who was injured in the course of his employment while temporarily in California. This result was reached even though the workman was entitled to receive compensation under the laws of Massachusetts and even though the Massachusetts law purported to provide an exclusive remedy.

Appellants' position was more clearly illustrated and more forcefully supported, however, on pages 11 and 12 of appellants' opening brief. On these pages is presented the case of *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 662, 67 S.Ct. 886. In that case, referring to the Illinois Workmen's Compensation statute (which is similar to both Arizona and Nevada law in wording and content) the Court said:

"But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment (citing cases). And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted (citing cases), we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play."

The Illinois "exclusive coverage" statute involved in this case reads in part as follows:

"No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act . . ." (Ill. Rev. Stat. 1943, ch 48)

Referring to this statute the Court in *McCartin* said:

"This section has been interpreted to mean that in situations to which the act applies, the right of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act has been abolished."

The clear import of the Court's statements in the *McCartin* case is that an "exclusive coverage" statute which is worded just as strongly as either the Arizona or Nevada statute is not sufficient to preclude the maintenance of an action under the laws of another state. It is generally

understood that a statute which intends to provide absolute exclusive coverage and even preclude actions brought under the laws of another state must say so explicitly or it will be interpreted to apply only to causes of action arising under the laws of the state in which the statute is enacted.

This is the point which appellants feel the Court overlooked in reaching its decision in the present case and upon which they base this petition for rehearing.

WHEREFORE, it is respectfully submitted that this Court reconsider its original decision pursuant to the points and authorities as set forth in this Petition for Rehearing.

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Tucson, Arizona

Attorneys for Appellants

BY LAWRENCE OLLASON

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EUGENE LYNCH,
Appellant

v.

DAVID R. LANDY, Deputy Commissioner and
WILLIAM K. ROGERS, Assistant Deputy
Commissioner, Bureau of Employees Com-
pensation, United States Department of
Labor and INDUSTRIAL INDEMNITY CO., et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES LANDY AND ROGERS

EDWIN L. WEISL, JR.,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

MORTON HOLLANDER,
JACK H. WEINER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FILED

OCT 16 1967

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21852

EUGENE LYNCH,
Appellant

v.

DAVID R. LANDY, Deputy Commissioner and
WILLIAM K. ROGERS, Assistant Deputy
Commissioner, Bureau of Employees Com-
pensation, United States Department of
Labor and INDUSTRIAL INDEMNITY CO., et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES LANDY AND ROGERS

JURISDICTIONAL STATEMENT

Appellant filed this action allegedly under the Longshoremen's
and Harbor Workers' Compensation Act, 33 U.S.C. 921 to recover
150,000 in damages as a result of injuries received in the
course of his employment (R. 1-6).^{1/} The district court dismissed
the complaint as to all parties on the grounds inter alia that
the court lacks jurisdiction over the subject matter" (R. 264).
his Court has jurisdiction under 28 U.S.C. 1291.

/ "R." references are to the original record on appeal.

COUNTERSTATEMENT OF THE CASE

Appellant Lynch was employed by Martinolich Ship Repair Co. On November 6, 1961, he was overcome by noxious fumes while cleaning tanks aboard a barge at Oakland, California (R. 11). The employer had immediate notice of this injury and the employee received medical attention on the date of the accident (R. 110). The employer paid the necessary medical bills and voluntarily paid him compensation from November 6, 1961 to December 19, 1961 in the total amount of \$128.57.

On November 23, 1962, Mr. Lynch filed a claim under the Longshoremen's and Harbor Workers' Compensation Act with the Bureau of Employees' Compensation (Appellant's Opening Brief, p. 13). This claim was designated as Claim No. 294-83 and is still pending before the Bureau of Employees' Compensation (R. 109).

In the interim, the appellant had filed suit directly against Martinolich Ship Repair Co. and Industrial Indemnity Company et al. (Civil No. 42571, N.D. Cal. So. Div.). The district court dismissed on the grounds inter alia that (1) the complaint failed to state a claim against the defendants; (2) the court lacks jurisdiction over the subject matter; and (3) the claim was barred by limitations. This Court denied leave to appeal in forma pauperis. The Supreme Court then denied certiorari (R. 221, 382 U.S. 844) and also denied rehearing (R. 222, 382 U.S. 949).

After certiorari and rehearing were denied, appellant again contacted the Bureau of Employees' Compensation. To assist him in his claim and because of the difficulty of understanding his varied motions, the Deputy Commissioner arranged for the Legal Aid Society of Alameda County to attempt to obtain counsel for him (R. 109). Mr. Lynch did not want his case heard by the Assistant Deputy Commissioner assigned to hear the case but wanted "The trial Judge [to] hearing my cause at the U. S. Court of Appeals." (R. 109).

Accordingly, he then brought this suit in the district court. At the hearing on the motion to dismiss, counsel for the Government informed the court that the district court lacked jurisdiction over the matter because the proper forum for the determination of a compensation claim until an award is made or the claim is rejected is the Deputy Commissioner, and not the district court. Judge Carter dismissed the action as to all defendants (R. 264). From that order, appellant filed notice of appeal. Subsequently, Judge Carter issued an additional order, detailing the additional papers subsequently filed by the appellant and treating them as motions for rehearing, and he denied each of them (R. 294).

QUESTION INVOLVED

Whether the district court has jurisdiction of a claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. when the claim is still pending administratively before the Deputy Commissioner.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AGAINST THE DEPUTY COMMISSIONER ON THE GROUND THAT IT HAD NO JURISDICTION OVER THE MATTER UNTIL AFTER THE DEPUTY COMMISSIONER HAD ADMINISTRATIVELY DISPOSED OF THE CLAIM.

This Court has expressly recognized that the district court has no jurisdiction of a suit under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. until

after a hearing and the making of a compensation order, not before. Until such time, by necessary implication, Congress has withheld from the court the power to act.

Paramino Lumber Co. v. Marshall, 95 F.2d 203, 205 (C.A. 9) certiorari denied 305 U.S. 603.

Accord: Leonard v. Liberty Mutual Insurance Co., 267 F.2d 421 (C.A. 3); Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42, 48 (C.A. 5); Associated-Banning Corp. v. Landy, 254 F.Supp. 275 (N.D. Cal. S.D. 1965).

Therefore, the district court correctly dismissed the complaint because the claim is still pending before the Deputy Commissioner. Thus, it is clear that this action is plainly premature.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

EDWIN L. WEISL, JR.,
Assistant Attorney General,

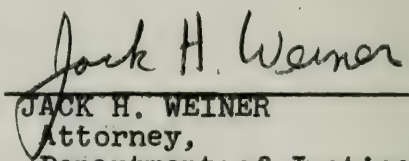
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United States Attorney,

MORTON HOLLANDER,
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Department of Justice,
Washington, D.C. 20530.

OCTOBER 1967.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JACK H. WEINER
Attorney,
Department of Justice,
Washington, D.C. 20530.

AFFIDAVIT OF SERVICE

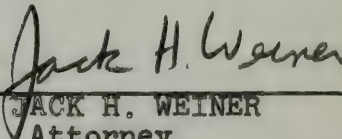
DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

JACK H. WEINER, being duly sworn, deposes and says:

That on October 13, 1967 , he caused three copies of the foregoing brief for the Deputy Commissioners to be served upon appellant and counsel for the co-appellee by placing them in the United States Mail, postage prepaid, air mail, in an envelope addressed to counsel as follows:

Mr. Eugene Lynch
1753 69th Avenue
Oakland, California 94621

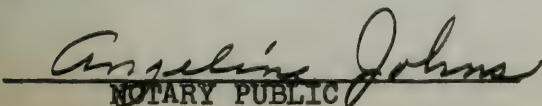
Lee H. Cliff, Esquire
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San Francisco, California 94104



JACK H. WEINER
Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and sworn to before
me this 13th day of October, 1967.

[Seal]


NOTARY PUBLIC

My Commission expires on April 14, 1972.

No. 21853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

vs.

FRANCES K. ARNOLD

Appellee

APPELLANT'S OPENING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

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J. HOWARD ARNOLD

P.O. Box 919,

Berkeley 1, Calif.

APPELLANT

No. 21853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appeal from the
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J.HOWARD ARNOLD

P.O. Box 919,

Berkeley 1, Calif.

APPELLANT

STATE OF NEW YORK
JAMES H. HARRIS

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THE UNIVERSITY OF CHICAGO

1. The University of Chicago is a private, non-profit, research university located in Chicago, Illinois. It was founded in 1837 and is one of the oldest and most prestigious universities in the United States. The university is known for its commitment to academic excellence and its diverse student body. It has a long history of producing world-class scholars and leaders in various fields of study. The university's research output is highly influential, and it has a strong reputation for its contributions to knowledge and society. The University of Chicago is a member of the Association of American Universities and is ranked among the top universities in the world.

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JURISDICTIONAL BASIS

This appeal is taken from a final judgment made and entered in the United States District Court for the Northern District of California, and is prosecuted in accordance with the provisions of Rule 72 et seq. of the Federal Rules of Civil Procedure. Jurisdiction of this Court is based on Section 47, Title 11, United States Code. Jurisdiction of the District Court is based on Sections 11, 711, and 712, Title 11, United States Code.

On June 19, 1962, Appellant J. HOWARD ARNOLD filed in U.S. District Court, San Francisco, an original petition for an Arrangement with Creditors under Chapter XII, Title 11, U.S. Code. On Sept. 25, 1962, the proceeding was transferred to Chapter XI by amendment.

On October 30, 1962, the Referee, the Honorable BERNARD J. ABROTT, made and entered an order confirming an Arrangement under Chap. XI. On Feb. 28, 1963, on petition of debtor's wife, FRANCES K. ARNOLD, Appellee, herein, Referee ABROTT ordered the confirmation set aside for "fraud in procurement" under Sec. 386(2) of the Bankruptcy Act, debtor's non-disclosure of his wife's pending divorce action allegedly preventing involvement of community real property in the Arrangement. The Referee's order setting aside confirmation was approved by District Judge SWEIGERT on review and affirmed on appeal by this Court (No. 18854) on Jan. 24, 1964.

On June 29, 1964, Appellant filed an Amended Plan of Arrangement, substantially similar to the first Plan, and urged confirmation on the ground that his wife's divorce action was totally irrelevant. The Referee denied confirmation on Nov. 10, 1964, and on review

[illegible]

100, the remaining six copies are distributed as follows: 25 to the
President under Chapter XII, Title 18, U.S. Code, Sec. 20,
Book 2, and 25 to the President as defined in the Department of
the House of Representatives, Chapter 1, Title 18, U.S. Code, Sec. 20.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Co-ordination Unit (BSCU) in the United States.

[illegible]

District Judge ZIRPOLI upheld the Referee's order. This Court affirmed the order on appeal, Feb. 28, 1966 (No. 20107), holding that despite the plain provisions of Sec.386(2) permitting a second Arrangement to be offered by the debtor, after curing of the "fraud in procurement" (i e. technical error), it was barred by an alleged final adjudication on the merits in the first appeal. Rehearing was denied by this Court on April 5, 1966.

Meanwhile, on March 9, 1966, despite his loss of jurisdiction to this Court on appeal, the Referee filed an Order to Show Cause Why Debtor Proceedings Should Not Be Dismissed (Transcript, pp.1-2).

On July 12, 1966, Appellant filed his objections to dismissal of the Arrangement proceeding (Transcript, pp.4,5,5-A) and noticed a motion to remove the cloud on the title of the real property involved in the Arrangement, said cloud having been created by the divorce proceedings between Appellant and Appellee. On Sept. 12, 1966, under the title "ORDER DISMISSING PROCEEDINGS", (Transcript, pp.17-19) the Referee decided both motions, denying Appellant's motion to remove cloud on title and granting the court's own motion to dismiss. On Nov. 16, 1966, District Judge GEORGE B.HARRIS ruled that Appellant's petition for review "is hereby DENIED", (Transcript, p. 58), and on Feb.9, 1967, denied Appellant's motion to alter and amend the judgment (Transcript, p. 69). Notice of appeal to this Court was filed on March 10, 1967. (Transcript, p.70)

The District Court has summary jurisdiction to determine validity of alleged liens on a debtor's property, by Sec. 67(a)(4), Bankruptcy Act (Sec.107a(4), U.S.Code).

United States District Court, Southern District of New York

Filed: 1997-07-10, 10:00 AM

Case No. 97-CV-00000

Re: [Name], Defendant

Before the Court is the motion of the Defendant to

dismiss the Complaint with prejudice.

The Defendant moves to dismiss the Complaint on the

grounds that the Complaint fails to state a claim for

relief upon which relief can be granted.

The Complaint alleges that the Defendant committed

various acts of fraud and misappropriation of funds.

However, the Complaint fails to allege any specific

facts or circumstances that would entitle the Plaintiff

to relief. The Complaint is therefore dismissed with

prejudice.

IT IS SO ORDERED.

Signed: [Name]

United States District Court, Southern District of New York

Filed: 1997-07-10, 10:00 AM

Case No. 97-CV-00000

Re: [Name], Defendant

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various acts of fraud and misappropriation of funds.

STATEMENT OF THE CASE

Five years ago today, Referee ABROTT confirmed Appellant's valid and proper Arrangement with Creditors, which he later set aside at Appellee's request on the presumption that her divorce action somehow prevented the involvement of Appellant's community real property in the Arrangement, and that the divorce court's "award" of Appellant's rights to Appellee effected a valid transfer of title to property in District Court custody.

In the order on appeal, the Referee refuses to exercise the paramount and exclusive jurisdiction in rem conferred on him by the Bankruptcy Act, and by such unlawful abstention seeks to give validity to the divorce "award" as a transfer of title, which it is not. Well-settled jurisdictional law holds that said property was seized by the District Court when Appellant's original debtor's petition was filed, that the Superior Court never had and could not take by divestiture such jurisdiction in rem, and could not give the assets to Appellee and the debts to Appellant in defiance of both State and Federal law. In addition to his unwarranted abstention, the Referee seeks to end the proceedings by dismissal without confirmation of an Arrangement, although the cloud on the real-property title is the sole obstacle to such confirmation. His motion to dismiss was void for lack of jurisdiction, as well as improper because the creditors were never notified of it.

The Referee's prior invocation of Sec. 386(2), Bankruptcy Act, was improper as a substitute for removal of the cloud on the title, but affirmation of his order on appeal was no bar to confirmation of a subsequently offered Arrangement, to which a debtor is entitled.

SPECIFICATION OF ERRORS

- (1) The Referee erred in his Finding of Fact (Transcript, p.18), that "the matter with reference to Petition to Remove Cloud on Title has previously been decided", as there has been no such decision by a court of competent jurisdiction, and none is cited.
- (2) The Referee erred in his Finding of Fact (ibid.) that "the Superior Court . . awarded the real property . ." to Appellee, if by "awarded" he meant "effected a valid transfer of title" of property in legal custody of the District Court.
- (3) The Referee erred in his Conclusion of Law (Transcript, p.19) that "the title to the real property has previously been decided", since he is the only judicial officer with power to do so, and he has never made such a decision.
- (4) The Referee erred in wilfully abstaining, without legal right, from the exercise of the paramount and exclusive jurisdiction in rem over a debtor's property, conferred on him by the Bankruptcy Act, by which he must adjudicate the validity of the Superior Court judgment on which Appellee bases her claim to the real property in fraud of creditors and in defiance of Appellant's rights.
- (5) The Referee erred in ordering the proceedings dismissed, without notice to creditors, and prior to a final decision on appeal of Appellant's motion to remove cloud on title.
- (6) The District Judge erred in merely denying Appellant's petition for review, without making an independent determination of the questions of law involved.

SUMMARY OF ARGUMENT

The Referee has twice denied confirmation to valid plans of Arrangement under Chapter XI on the ground that Appellee's divorce judgment bars involvement of community real property in Appellant's proceeding for an Arrangement. Federal and California law agree that no such bar exists, but the Referee refuses to exercise his paramount and exclusive jurisdiction in rem over property in possession of the debtor on filing his original petition, claiming incorrectly that the question of title has been decided and by his unwarranted abstention denying debtor and creditors the benefits of the Bankruptcy Act. The Referee should have taken jurisdiction and removed the cloud on Appellant's title caused by Appellee's divorce judgment, clearing the way for confirmation of Arrangement. The District Judge likewise abstained improperly, failing to make the required independent analysis of the questions of law presented, and giving no reason whatever for denying the petition for review. The Superior Court has never held jurisdiction in rem over Appellant's debtor's estate enabling that court to transfer title to Appellee, and no title transfer has taken place, but only a determination of inchoate rights between the spouses and subject to creditors' claims. Only the District Court has jurisdiction to quiet title or remove a cloud on title to debtor's real property, and the District Court has never done so. In the complete absence of any decision by the District Court on the issue of title, res judicata cannot be claimed by Appellee or Referee. Appellee has no lien or claim as a wife entitling her to ownership of community property free and clear of creditors' claims; she is not a "super-creditor" but a co-debtor, jointly liable for her husband's debts.

ARGUMENT

I

A COURT OF BANKRUPTCY HAS JURISDICTION TO QUIET TITLE AND REMOVE CLOUDS ON TITLE TO PROPERTY INVOLVED IN ITS PROCEEDINGS.

Any property possessed by a debtor at the time of filing his original petition under the Bankruptcy Act is legally seized by the District Court, whose paramount and exclusive jurisdiction in rem thereupon attaches, barring any other court from dealing with that property by imposition of liens or transfer of title.

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the (debtor) and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition . . . It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the District Court having acquired the exclusive right to administer all property in the (debtor's) possession. . . ."

Straton v. New (1931) 283 U.S. 318

The property seized includes community property if the debtor is a husband (but not if the debtor is a wife, who holds no ownership interest reachable by creditors through judicial process, but only a protected expectancy, an inalienable heirship.)

Grolemund v. Cafferata (1941) 17 Cal. 2nd 679

Cummings (Mrs.), In re (1949) 84 Fed. Supp. 65 (DC, Cal.)

Taylor v. Sternberg (1934) 293 U.S. 470

A Federal court of bankruptcy has jurisdiction in title disputes,
Schultz v. England (1939) 106 Fed. 2nd 764 (CA, 9th)
and upon finding that the debtor was in possession at the time of
filing his original petition may act summarily.

Sulmeyer v. Pfohlman (1964) 329 Fed. 2nd 915
A wife's claim to community property may be determined summarily.
Freitas, In re (1936) 16 Fed Supp. 557 (DC, Cal.)

In the case at bar, since Appellant's possession continued until
his eviction by void Superior Court order on March 20, 1963, and
his original petition was filed June 19, 1962, the District Court
had jurisdiction --exclusively-- to quiet title summarily, and the
Referee was duty-bound to make a determination de novo of the
validity of the Superior Court "award" as a transfer of title, if
he considered that judgment a bar to confirmation of Arrangement.

II

THE REFEREE IMPROPERLY ABSTAINED FROM THE EXERCISE OF HIS PARAMOUNT
AND EXCLUSIVE JURISDICTION TO REMOVE THE CLOUD ON THE TITLE.

It might be thought, on casual reading of the order on appeal (FR.
p. 18-19) that the Referee had found the Superior Court judgment
"award" to be a valid transfer of title under State and Federal law,
but study of the Reporter's Transcript (Transcript, pp. 76-82)
shows clearly that he had not examined the law, but had merely
accepted a void judgment of another court as a matter of comity,
refusing to pass on its validity and looking to other courts for a
final determination of the matter. The Referee has said:

"I do not think that it is within the power of the Referee in
Bankruptcy to pass judgment on what the Superior Court did and
any Appellate State Court did. I cannot reverse them."

Transcript, p.79, line 18.

"So if some other Court has made an award of the real property to Frances Arnold, I do not think I have the power to reverse the State Court."

Transcript, p. 80, line 4

"Well, I am not ruling on the Cloud on the Title. What I am saying is the State Court awarded the real property to your wife."

Transcript, p.80, line 13

"That would be up to the District Court on the Review to decide whether or not the property was actually in your possession and in the possession of the Federal Court and the Superior Court exceeded its jurisdiction in awarding the property to Frances Arnold."

Transcript, p. 80, line 24

It is evident that the Referee erred in refusing to make the basic decision himself, preferring to leave it to the District Judge; that the Referee incorrectly believed he had no power to declare the Superior Court judgment void as a transfer of title; that the Referee did not realize that the "award" was not a transfer of title, but only of a wife's inchoate rights from her husband; that the Referee failed to observe that the District Court of Appeal had not affirmed the "Award" but effectively reversed it by providing it would not take effect ^{until} ~~on~~ Final Judgment of Divorce, and thus no bar whatever to confirmation of the Arrangement was offered by the Superior Court judgment, which did not determine title.

III

SUPERIOR COURT JURISDICTION, CONCURRENT OR EXCLUSIVE, OVER DEBTOR'S ESTATE HAS NEVER EXISTED, NO TITLE TRANSFER OCCURRING AT ANY TIME. Although Appellee's divorce complaint was filed Nov. 29, 1961, antedating Appellant's original Arrangement petition by six months, its priority in time is meaningless so far as seizure of community property is concerned. Filing of a divorce complaint does not accomplish a legal seizure, so as to place the property in custody of the court in the same manner as filing of a Bankruptcy-Act petition.

Lord v. Hough (1872) 43 Cal. 581

Harrold v. Harrold (1954) 43 Cal. 2nd 77

"While a divorce is pending, the power of a husband over the community property exists until the entry of a final decree."

Harrold v. Harrold, supra, at p. 81

Thus, on Nov. 29, 1961, the Superior Court did not seize the community property upon filing of the divorce complaint. On June 19, 1962, Appellant's filing of his original petition for an Arrangement resulted in seizure of the community real property by the court of bankruptcy, which has held the property in custody since that time. Normally, the Superior Court takes jurisdiction in rem to transfer title or impose a lien when judgment is recorded; until that time, the property remains under management and control of the husband.

Chance v. Kobsted (1934) 66 Cal. App. 434

However, when the Interlocutory Judgment in Arnold v. Arnold was recorded on Oct. 22, 1962, the property was held by the District Court, thus being unavailable for seizure by the Superior Court. Even if the Superior Court had seized the property and held it in custody, District Court seizure would not be prevented.

"The fact that the jurisdiction of the (Federal) court is paramount effectually distinguishes that class of cases which hold that as between courts of concurrent jurisdiction property in the hands of a receiver of one of them cannot rightfully be taken from him without that court's consent by a receiver subsequently appointed by the other court . . the jurisdiction of the (Federal) court is paramount and not concurrent . . the power of the state court, . necessarily came to an end with the supervening bankruptcy."

Gross v. Irving Trust Co. (1933) 289 U.S. 342

". . its being prior in time cuts no figure. The priority of right in the bankruptcy court . . must prevail . . without regard to the rules of comity, for as respects this matter the courts are not of concurrent jurisdiction."

Moore, In re (1930) 42 Fed. 2nd 475 (DC, Ga.)

The only recognized exception to the paramount jurisdiction in rem of the bankruptcy court occurs when the suit in the other court has the purpose of enforcing a pre-existing lien, as in a foreclosure of a mortgage on real property.

"A state court has exclusive jurisdiction of the res only to the extent the liens thereon are valid as against the trustee in bankruptcy. . state court action, to the extent it may have attempted to deal in rem with the property, abated upon the filing of the petition."

Engelbrecht v. Wildman (1959) 263 Fed. 2nd 133 (CA, 9th)

Walker v. Detwiler (1940) 110 Fed. 2nd 154 (CA, 6th)

no lien in favor of the wife existing, divorce actions are excluded.

IV

A DIVORCE COURT CANNOT LEGALLY AWARD COMMUNITY ASSETS TO A WIFE FREE AND CLEAR OF CREDITORS' CLAIMS, NOR DEBTS TO A HUSBAND.

A divorce action between two spouses is inherently incapable of adjudicating the rights of creditors unjoined as defendants. The judgment in such an action merely settles the rights of the wife as against the husband, without impairing the claims of creditors.

"This divorce action is not an in rem action to quiet title against the world; it is a disposition of property as between the spouses incident to the dissolution of the marital relation."

McClenny v. Sub. Ct. (1964) 62 Cal. 2nd 140 at 147

Farrow v. Ostrom (1943) 16 Wash.2nd 547, 133 Pac.2nd 974

Arneson v. Arneson (1951) 38 Wash.2nd 99, 227 Pac.2nd 1016

If the assets are given to the wife, without allowance for the debts of the marital community, the judgment is against law, void.

Rethers v. Rethers (1956) 140 Cal.App. 28

"Community property", as the term is used in the divorce laws (Sec. 146, Calif. Civil Code) does not refer to total assets, but to the residual net assets after allowance for the secured and unsecured debts of the husband, for which the marital community is liable.

Packard v. Arellanes (1861) 17 Cal. 525

Bank of America v. Mentz (1935) 4 Cal. 2nd 322

Grolemund v. Cofferate (1941) 17 Cal. 2nd 679

Earlier, this Court followed established California law in deciding against another wife who sought to take community assets without paying creditors' claims against the marital community:

1998

"(Her) contention seems to be that as a member of the marital community she is entitled to the possession of the entire community property and the community debts must go unpaid, save and except such indebtedness as is secured by mortgage or other encumbrance executed by the husband and wife. . It would seem to be a sufficient answer to (her) contention to call attention to the fact that the Supreme Court of California, as early as 1861. . held that the term 'community property' as used in the statutes of California as between husband and wife and the creditors meant a residuum of the property . . after the payment of the community debts . . the courts of California have decided that the community property . . is subject to community debts. . It follows that the trustee in bankruptcy is entitled to the possession of community property for the benefit of creditors. . "

Hannah v. Swift (1932) 61 Fed. 2nd 307 (CA, 9th)

This Court has recently twice reaffirmed this principle of law.

Sulmeyer v. Pfohlman (1964) 329 Fed. 2nd 915 (CA, 9th)

Martolf v. Elliott (1963) 326 Fed. 2nd 204 (CA, 9th)

It should be followed in the case at bar, where Federal courts have permitted illegal seizure and disposal of a debtor's estate by an aggressive and ruthless divorce court acting in open defiance of California and Federal law.

Without satisfaction of creditors' claims, an Interlocutory Judgment of divorce cannot transfer title to community property, but can only determine the rights of the spouses, tentatively, for its guidance in granting a possible later Final Judgment of Divorce.

"(How) everything seems to be that is a matter of the world."

[illegible]

... the subject of ...
... is ...
... the ...

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

THE STATE COURT DECISIONS REQUIRE ONLY INTERPRETATION, NOT REVERS-
AL BY THE REFEREE, FOR PROPER SETTLEMENT OF QUESTIONS OF TITLE.

The Referee, like the Superior Court trial judge, presumes incorr-
rectly that the Interlocutory Judgment could and did transfer title
of Appellant's property (his debtor's estate) to Appellee without
satisfying or even considering creditors' claims, and without any
regard for the simultaneous proceedings in Federal District Court.
However, the District Court of Appeal held that no transfer of
title occurred on Interlocutory Judgment:

"The interlocutory decree, however, makes a present disposi-
tion of the community property. It is now settled that such
an award is improper and, where made, should be modified by
the appellate court so as to provide that the provisions dis-
posing of the community property of the parties shall be
effective upon the entry of the final decree of divorce.
(Brown v. Brown (1960) 177 Cal. App. 2nd 387). . For the
reasons above stated, the trial court is directed to modify
the interlocutory decree of divorce to provide that the pro-
visions disposing of the parties' community property shall be
effective upon the entry of the final decree of divorce; the
interlocutory decree, as so modified, is affirmed. ."

Arnold v. Arnold, 1 Civil 21272, Feb. 14, 1964 (unpubl.)

The "award" is thus merely a judgment in personam, determining the
rights of the parties after claims of creditors are satisfied, and
making no present attempt to transfer title to real property. Ob-
viously, if this decision had reversed a long line of decisions
upholding the rights of creditors, it would have merited publica-

on under Rule 976, Calif. Rules of Court; but it was not published, and cannot be held to have the meaning the Referee gives it. Likewise, there is no need for the Referee to reverse the District Court of Appeal decision, which does not seek to quiet title in Appellee, but only determines personal rights. (In other decisions it has been held that the Superior Court had jurisdiction in rem sufficient to evict Appellant from his debtor's estate, but such decisions are irrelevant here, as well as obviously incompatible with well-settled Federal law upholding the paramount and exclusive jurisdiction in rem conferred by the Bankruptcy Act.) After the Interlocutory Judgment of Divorce, Appellee's interest remained " . . . an inchoate one and not such as to form the basis for an action to quiet title."

Chance v. Kobsted (1924) 56 Cal. App. 434

The case at bar is complicated by the dual status of Appellant as debtor in an Arrangement proceeding and husband in a divorce suit. As debtor, he is answerable only to the court of bankruptcy for his control of his debtor's estate; as husband, he has no estate to be controlled by the divorce court through its jurisdiction in personam over him in the role of divorce-action defendant.

Coleman v. Alcock (1959) 272 Fed. 2nd 618 (CA, 5th)

Terrace Lawn Gardens, In re (1958) 256 Fed. 2nd 398 (CA, 9th)
Rendition of Interlocutory Judgment of Divorce, Oct. 22, 1962, Appellant held no title to community property as a husband; since June 19, 1962, he had held title as debtor in possession acting as trustee for the District Court, which alone had power to determine title and possession of property in its custody.

PELLEE HAD NO LIEN OR CLAIM AGAINST THE COMMUNITY PROPERTY THAT
ULD NULLIFY FEDERAL JURISDICTION AND BAR THE ARRANGEMENT.

second complication in the case at bar arises from the priority
time of the filing of the divorce action, six months ahead of
a Arrangement petition. As already shown (This Brief, p.10), the
important factor in determining jurisdiction over the property is
t time, but lien rights, and Appellee had no lien or other claim
which could serve to give her the status of a "super-creditor"
entitled to deprive a Federal court of a debtor's estate. Filing
her divorce action gave her no lien, nor did rendition of the
Interlocutory Judgment of Divorce only 8 days before confirmation
Arrangement (the Referee evidently attaches great importance to
s 8-day priority, but incorrectly, as the important date is
t of filing debtor's original petition, which places his prop-
y in custody of the District Court, and not that of confirma-
n involving property long since taken into court custody and
before unreachable by any Superior Court judgment). Appellee
no lien merely because of her status as a debtor's wife,

Potts, In re (1944) 142 Fed. 2nd 883 (DC, Ky.)

Hawk v. Hawk (1800) 102 Fed. 679 (DC, Ark.)

does she acquire any lien by the mere filing of a divorce suit.

Todd v. Todd (1955) 133 Colo.1, 291 Pac. 2nd 386

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

Hornsby v. Hornsby (1936) 127 Tex. 474, 93 SW 2nd 379

tion of the Interlocutory Judgment of Divorce did not disturb
husband's management and control, which continue to Final Judg-
of Divorce,

RECEIVED BY THE SECRETARY OF THE ARMY, WASHINGTON, D.C. 20315

DATE: 10/10/50

TO: THE SECRETARY OF THE ARMY, WASHINGTON, D.C. 20315

FROM: THE SECRETARY OF THE ARMY, WASHINGTON, D.C. 20315

SUBJECT: [Illegible]

REFERENCE: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

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12. [Illegible]

13. [Illegible]

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16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

21. [Illegible]

defrauding the creditors of the husband and amounted to a legal fraud. . ."

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

ere, no lien attached because of the operation of Oklahoma law; the case at bar, no lien attached because of the prior seizure the property by the Federal court. Without a valid pre-existing en, the debtor's wife cannot legally use State court process to In title to community property in disregard of creditors' rights.

VII

EN PRIOR TERMINATION OF A MARRIAGE DOES NOT IRRETRIEVABLY ELIM-
ATE COMMUNITY PROPERTY FROM THE ESTATE OF A DEBTOR HUSBAND.

a debtor husband should transfer title voluntarily to his wife
ore filing his original petition, the court of bankruptcy would
claim the property on grounds of fraudulent preference. If the
nsfer is made forcibly by a divorce court, against the wishes of
husband, the property may still be returned to the debtor's
ate and the transfer voided as fraudulent, under Section 70(e)(1)
krupctcy Act, if it rendered the husband bankrupt without fair
sideration, even though divorce preceded bankruptcy.

Britt v. Damson (1964) 334 Fed.2nd 896 (CA, 9th)

Bankruptcy Act confers upon the District Court summary juris-
tion to compel surrender of a voidable preference.

Katchen v. Landy (1965) 382 U.S. 323

oluntary transfer from an insolvent debtor to his family is
sumed to be fraudulent as to creditors.

Menick v. Goldy (1955) 131 Cal. App. 2nd 542

lvice judgment with the same effect is likewise fraudulent.

119

THE VALIDITY OF THE INTERLOCUTORY JUDGMENT OF DIVORCE AS A CLOUD
ON THE TITLE TO DEBTOR'S REAL PROPERTY HAS NEVER BEEN DECIDED.

It is clear from the District Court of Appeal decision (This Brief, p. 13) that the Superior Court "award" was not and could not be a transfer of title at the time of Interlocutory Judgment of Divorce. Considered as a transfer of title, the Superior Court judgment is void for lack of statutory authority, as well as for involving property in District Court custody. Considered as a tentative determination of spouses' rights, it is valid, but offers no obstacle to confirmation of the Arrangement. The State courts, while usurping and exercising jurisdiction to evict a debtor from his estate, have not defended, in any quiet-title suit, their jurisdiction in them for the purpose of transferring title to Appellee without consideration of community debts. Only the Referee --not any District Judge or panel of this Court--seems to regard the Superior Court "award" as a title transfer barring confirmation of Arrangement. Quotations from the Reporter's Transcript (This Brief, pp. 7, 8) show clearly that the Referee looks to higher judicial levels for approval or disapproval of the "award" of title to Appellee, but thus far 3 District Judges and 2 panels of this Court have failed or refused to decide whether the Interlocutory Judgment gave title to Appellee, though that point is the central one in this case.

At the first review and appeal (No. 18854 in this Court), the Referee's order setting aside the Arrangement under Sec. 386(2), Bankruptcy Act, was affirmed.

Arnold v. Arnold (1964) 326 Fed. 2nd 960 (CA, 9th)

THESE ARE THE NAMES OF THE PERSONS WHO HAVE BEEN
RECEIVED INTO THE CHURCH SINCE THE LAST MEETING.

then, as now, the Referee was motivated by doubt of the ownership of the community real property involved in the Arrangement, but the reason for his decision does not clearly appear from the language used by Appellee's counsel in composing the order:

" . . . fraud was practiced by the debtor. . . in procuring the Confirmation of the Arrangement. . . by concealing from this Court all facts of his marriage and divorce. . . "

Obviously, if the divorce judgment transferred the property title to Appellee, Appellant had, fraudulently or not, failed to disclose to the Referee a material fact which barred the confirmation; if the divorce judgment did not transfer the title, its existence was not material and confirmation was not barred. There was no curable fraud in procurement' (mere technical error) calling for the use of Sec. 386(2), Bankruptcy Act; there was simply a cloud on the title which the Referee should have removed summarily. However, Referee, District Judge, and this Court all refused to decide the question of validity of the divorce judgment as a transfer of title.

On the second review and appeal (No. 20107 in this Court), the Referee's order denying confirmation of an amended Arrangement was affirmed, again with no decision on the central issue of title to the real property. This Court affirmed on the ground that the first appeal "finally adjudicated" the invalidity of the similar initial plan, precluding submission of a second plan despite the plain provisions of Sec. 386(2) permitting curative modification for the purpose of curing of 'fraud in procurement'.

Arnold v. Arnold (1966) 356 Fed. 2nd 873 (CA, 9th)

Again the central issue of property title was left unmentioned.

and he has been very successful in his work.

1. There are two types of the disease, the common and the rare.

[illegible]

THE COURT OF APPEALS IN NEW YORK

1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 26

In the third review, which led to this appeal, District Judge HARRIS again refused to decide the cloud-on-title question, or to remand the case to the Referee for decision; nor did he state any basis for his decisions on petition for review and motion to amend, or indicate that he had made the independent examination of the applicable law which is required of him.

Newcomb Interests, Inc., In re (1959) 171 Fed. Supp. 704 (DC, Cal.)

Hedgeside Corp., In re (1952) 123 Fed. Supp. 933 (DC, Cal.)

IX

WILFUL, UNLAWFUL JUDICIAL ABSTENTION FROM EXERCISE OF JURISDICTION HAS UNJUSTLY DEPRIVED APPELLANT OF BENEFITS OF BANKRUPTCY ACT.

Doubt as to wife's and husband's interests in property is not a difficulty justifying dismissal of Bankruptcy Act proceedings.

Mangus v. Miller (1942) 317 U.S. 178 at 181

The Act contemplates that the debtor emerge with all his property still in his possession, and with his creditors' claims satisfied.

Mangus v. Miller, supra

Wright v. Vinton Branch (1936) 300 U.S. 440

John Hancock Co. v. Bartels (1939) 308 U.S. 180 at 184

In the case at bar, on the contrary, the Appellant has been given no relief, but has been illegally stripped of his debtor's estate by State courts while Federal courts look the other way. It is the plain duty of the District Court to assume jurisdiction and take control of property possessed by a debtor on filing his petition.

Heise v. McMullen (1925) 6 Fed. 2nd 462 (CA, 4th)

Sampsell v. Papenhausen (1946) 79 Fed. Supp. 45 (DC, Cal.)

Federal court is obligated to take jurisdiction and decide diffi-

1

cult or uncertain questions of State law, avoiding abdication to State courts.

Meredith v. Winter Haven (1943) 320 U.S. 228

Am.Auto.Ins.Co. v.Freundt (1939) 103 Fed. 2nd 613(CA,7th)

Natl.Bk.of Comm.v.Council (1950)339 Ill.App.585, 91 NE2nd 66

While in certain special cases some issues may be litigated in the State courts, with Federal court assent, this case is not one in which abstention from the assumption and exercise of Federal jurisdiction is proper; nor may the Federal court abandon its property to the State court.

Mach-Tronics v. Zirpoli (1963) 316 Fed.2nd 820 (CA,9th)

County of Allegheny v. Mashuda Co. (1958) 360 U.S. 185

U.S.Fidelity & Guar.Co.v. Bray (1912) 225 U.S. 305

The Referee may not extinguish creditors' rights, without notice to them, by erroneously dismissing the proceedings without cause, on the assumption that an Arrangement cannot be confirmed.

Koncus, In re (1941) 123 Fed. 2nd 92 (CA, 7th)

Creditors and debtor are entitled to arrive at an Arrangement, if possible, after this Court properly determines their rights.

Wragg v. Fed.Land Bank (1943) 317 U.S. 325

The Referee's action in pressing his own motion to dismiss --void for lack of jurisdiction pending appeal, and improper prior to a final decision on the substantive issue of title--in order to be relieved of the responsibility of removing the cloud on the title, is not commendable and should not be endorsed by this Court.

White's Jewelers, In re (1949)88 Fed. Supp. 145 (DC,Mo.)

Appellant's title should be affirmed by the Referee.

[illegible]

1892

See you on (2003) next year at 10/10/03

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Source: U.S. Census Bureau, *Current Population Reports*, 1990, 1995, 2000, 2005, 2010, 2015, 2020, 2025, 2030, 2035, 2040, 2045, 2050, 2055, 2060, 2065, 2070, 2075, 2080, 2085, 2090, 2095, 2100, 2105, 2110, 2115, 2120, 2125, 2130, 2135, 2140, 2145, 2150, 2155, 2160, 2165, 2170, 2175, 2180, 2185, 2190, 2195, 2200, 2205, 2210, 2215, 2220, 2225, 2230, 2235, 2240, 2245, 2250, 2255, 2260, 2265, 2270, 2275, 2280, 2285, 2290, 2295, 2300, 2305, 2310, 2315, 2320, 2325, 2330, 2335, 2340, 2345, 2350, 2355, 2360, 2365, 2370, 2375, 2380, 2385, 2390, 2395, 2400, 2405, 2410, 2415, 2420, 2425, 2430, 2435, 2440, 2445, 2450, 2455, 2460, 2465, 2470, 2475, 2480, 2485, 2490, 2495, 2500, 2505, 2510, 2515, 2520, 2525, 2530, 2535, 2540, 2545, 2550, 2555, 2560, 2565, 2570, 2575, 2580, 2585, 2590, 2595, 2600, 2605, 2610, 2615, 2620, 2625, 2630, 2635, 2640, 2645, 2650, 2655, 2660, 2665, 2670, 2675, 2680, 2685, 2690, 2695, 2700, 2705, 2710, 2715, 2720, 2725, 2730, 2735, 2740, 2745, 2750, 2755, 2760, 2765, 2770, 2775, 2780, 2785, 2790, 2795, 2800, 2805, 2810, 2815, 2820, 2825, 2830, 2835, 2840, 2845, 2850, 2855, 2860, 2865, 2870, 2875, 2880, 2885, 2890, 2895, 2900, 2905, 2910, 2915, 2920, 2925, 2930, 2935, 2940, 2945, 2950, 2955, 2960, 2965, 2970, 2975, 2980, 2985, 2990, 2995, 3000, 3005, 3010, 3015, 3020, 3025, 3030, 3035, 3040, 3045, 3050, 3055, 3060, 3065, 3070, 3075, 3080, 3085, 3090, 3095, 3100, 3105, 3110, 3115, 3120, 3125, 3130, 3135, 3140, 3145, 3150, 3155, 3160, 3165, 3170, 3175, 3180, 3185, 3190, 3195, 3200, 3205, 3210, 3215, 3220, 3225, 3230, 3235, 3240, 3245, 3250, 3255, 3260, 3265, 3270, 3275, 3280, 3285, 3290, 3295, 3300, 3305, 3310, 3315, 3320, 3325, 3330, 3335, 3340, 3345, 3350, 3355, 3360, 3365, 3370, 3375, 3380, 3385, 3390, 3395, 3400, 3405, 3410, 3415, 3420, 3425, 3430, 3435, 3440, 3445, 3450, 3455, 3460, 3465, 3470, 3475, 3480, 3485, 3490, 3495, 3500, 3505, 3510, 3515, 3520, 3525, 3530, 3535, 3540, 3545, 3550, 3555, 3560, 3565, 3570, 3575, 3580, 3585, 3590, 3595, 3600, 3605, 3610, 3615, 3620, 3625, 3630, 3635, 3640, 3645, 3650, 3655, 3660, 3665, 3670, 3675, 3680, 3685, 3690, 3695, 3700, 3705, 3710, 3715, 3720, 3725, 3730, 3735, 3740, 3745, 3750, 3755, 3760, 3765, 3770, 3775, 3780, 3785, 3790, 3795, 3800, 3805, 3810, 3815, 3820, 3825, 3830, 3835, 3840, 3845, 3850, 3855, 3860, 3865, 3870, 3875, 3880, 3885, 3890, 3895, 3900, 3905, 3910, 3915, 3920, 3925, 3930, 3935, 3940, 3945, 3950, 3955, 3960, 3965, 3970, 3975, 3980, 3985, 3990, 3995, 4000, 4005, 4010, 4015, 4020, 4025, 4030, 4035, 4040, 4045, 4050, 4055, 4060, 4065, 4070, 4075, 4080, 4085, 4090, 4095, 4100, 4105, 4110, 4115, 4120, 4125, 4130, 4135, 4140, 4145, 4150, 4155, 4160, 4165, 4170, 4175, 4180, 4185, 4190, 4195, 4200, 4205, 4210, 4215, 4220, 4225, 4230, 4235, 4240, 4245, 4250, 4255, 4260, 4265, 4270, 4275, 4280, 4285, 4290, 4295, 4300, 4305, 4310, 4315, 4320, 4325, 4330, 4335, 4340, 4345, 4350, 4355, 4360, 4365, 4370, 4375, 4380, 4385, 4390, 4395, 4400, 4405, 4410, 4415, 4420, 4425, 4430, 4435, 4440, 4445, 4450, 4455, 4460, 4465, 4470, 4475, 4480, 4485, 4490, 4495, 4500, 4505, 4510, 4515, 4520, 4525, 4530, 4535, 4540, 4545, 4550, 4555, 4560, 4565, 4570, 4575, 4580, 4585, 4590, 4595, 4600, 4605, 4610, 4615, 4620, 4625, 4630, 4635, 4640, 4645, 4650, 4655, 4660, 4665, 4670, 4675, 4680, 4685, 4690, 4695, 4700, 4705, 4710, 4715, 4720, 4725, 4730, 4735, 4740, 4745, 4750, 4755, 4760, 4765, 4770, 4775, 4780, 4785, 4790, 4795, 4800, 4805, 4810, 4815, 4820, 4825, 4830, 4835, 4840, 4845, 4850, 4855, 4860, 4865, 4870, 4875, 4880, 4885, 4890, 4895, 4900, 4905, 4910, 4915, 4920, 4925, 4930, 4935, 4940, 4945, 4950, 4955, 4960, 4965, 4970, 4975, 4980, 4985, 4990, 4995, 5000, 5005, 5010, 5015, 5020, 5025, 5030, 5035, 5040, 5045, 5050, 5055, 5060, 5065, 5070, 5075, 5080, 5085, 5090, 5095, 5100, 5105, 5110, 5115, 5120, 5125, 5130, 5135, 5140, 5145, 5150, 5155, 5160, 5165, 5170, 5175, 5180, 5185, 5190, 5195, 5200, 5205, 5210, 5215, 5220, 5225, 5230, 5235, 5240, 5245, 5250, 5255, 5260, 5265, 5270, 5275, 5280, 5285, 5290, 5295, 5300, 5305, 5310, 5315, 5320, 5325, 5330, 5335, 5340, 5345, 5350, 5355, 5360, 5365, 5370, 5375, 5380, 53

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APPELLEE'S PLEA OF RES JUDICATA CANNOT PREVAIL HERE, SINCE THE ISSUE OF THE CLOUD ON THE TITLE HAS NEVER BEEN DECIDED.

Appellee contends strenuously (Transcript, pp.13, 48) that all the matters at issue in this appeal have been adjudicated in the two previous appeals, that the rights of the parties hereto have been finally determined, and that Appellant is estopped in seeking a determination of the validity of the Interlocutory Judgment of Divorce as a cloud on the real-property title, that matter being res judicata. However, the res judicata doctrine has no application in this instance, as the causes of action are not the same.

"A former judgment is not a bar to a subsequent action between the same parties if the subject matter involved in the two actions is not identical, although it may conclude the parties as to the issues actually litigated and determined. But identity of the subject matter is not alone a sufficient test. The true requirement is that the causes of action in the two suits shall be the same. . . the same transaction or state of facts may give rise to distinct or successive causes of action and a judgment upon one will not bar a suit upon another. Therefore a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same. 34 C.J.811"

Walrath v. Roberts (1927) 23 Fed. 2nd 32 (CA,9th)

Rushing v. Mayfield (1937) (Tex.Civ.A.)104 SW 2nd 619

Friend v. Talcott (1912) 228 U.S. 27

THESE ARE THE ONLY TWO COPIES OF THE REPORT WHICH WERE SUBMITTED TO THE BOARD OF THE COMMISSIONERS OF THE GENERAL LAND OFFICE.

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* A typical laboratory is not a safe or pleasant setting.

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The cause of action in the first and second appeals was Appellant's right to have a plan of Arrangement confirmed. In this third appeal, no plan of Arrangement is involved, the cause of action being Appellant's right to have the District Court remove the cloud on the title to his community real property. Both prior appeals were decided on the erroneous supposition that the Referee found "there was fraud in the arrangement", whereas his utilization of Sec. 386(2), Bankruptcy Act, proves that the Referee found only "fraud in procurement" (non-disclosure of the divorce judgment) which was actually non-existent, and did not consider the merits of the Arrangement itself, as this Court supposed he had. This third appeal, on a new issue never previously decided, is not barred by the decisions on the first two appeals.

"Nor can . . . (two cases). . . also relied upon by the respondents be considered as authority upon the point, since it is not considered in either opinion."

Mortgage Guar. Co. v. Chotiner (1936) 8 Cal.2nd 110 at 114
"If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined."

Va.-Carolina Chem. Co. v. Kirven (1909) 215 U.S. 252 at 257

Moreover, Appellee's counsel, whose masterful efforts at obfuscation and misrepresentation of the issues in the first two appeals may be directly responsible for the absence from this Court's opinions of a definitive holding on the central issue of the case, cannot now be heard to complain that all matters at issue have been decided and that Appellant is engaged in frivolous harassment.

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"If the record reflects a bona fide business deal, the fact of the judgment is limited to that which was actually disclosed and determined."

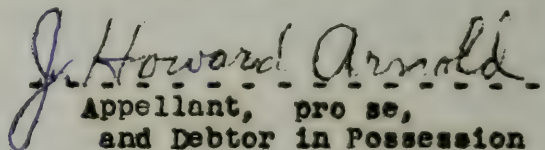
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CONCLUSIONS

Referee ABROTT's finding of fact, that the matter with reference to removal of the cloud on title has already been decided, is untrue and clearly erroneous, as is his conclusion of law that the title to Appellant's community real property has previously been decided. Referee ABROTT has unlawfully abstained from the exercise of the District Court's paramount and exclusive jurisdiction in rem under the Bankruptcy Act, whereby he had power to determine the title. District Judge HARRIS has failed and refused to make an independent decision of the questions of law presented to him on review, and has thus deprived Appellant debtor and his creditors of the benefits provided by the Bankruptcy Act. Appellee has no legal claim to title and possession of said debtor's estate, and cannot plead res judicata in the absence of any Federal court decision re title. The District Court decision should be reversed, and the case remanded for further proceedings leading to confirmation of Arrangement.

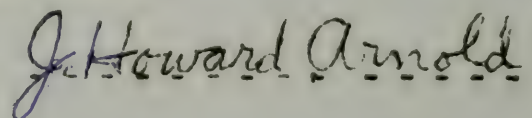
Dated: October 30, 1967.

Respectfully submitted,


Appellant, pro se,
and Debtor in Possession

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.



1951-1952

The following are the names of the persons who have been identified as having been involved in the activities of the Communist Party, U.S.A., during the period from 1940 to 1960:

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Security Services in the United States.

No. 21853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

vs.

FRANCES K. ARNOLD

Appellee

APPELLANT'S CLOSING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

JAN 9 1968

WM. B. LUCK, CLERK

J. HOWARD ARNOLD

P.O. Box 919,

Berkeley 1, Calif.

APPELLANT

No. 21853

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD

APPELLANT

vs.

FRANCES K. ARNOLD

Appellee

APPELLANT'S CLOSING BRIEF

Appeal from the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J. HOWARD ARNOLD
P.O. Box 919,
Berkeley 1, Calif.

APPELLANT

ALABAMA TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

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1935

Volume 42, Number 18, May 1, 1935

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DEPARTMENTS

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THE TREATMENT OF TUBERCULOSIS

W. H. L. ROBERTSON, M.D., AND J. H. ROBERTSON, M.D.

CLINICAL CASE REPORTS

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THE TREATMENT OF TUBERCULOSIS

W. H. L. ROBERTSON, M.D., AND J. H. ROBERTSON, M.D.

RESTATEMENT OF THE CASE

Although this is the third appeal in this proceeding, a basic preliminary question still remains unresolved: Does the estate of Appellant debtor include the community real property he seeks to involve in his Arrangement with Creditors? Although the Referee should have settled this question summarily at the outset by concluding, in accordance with established California and Federal law, that Appellee's divorce suit was immaterial and irrelevant to this proceeding, he chose instead to charge Appellant with "fraud in procurement" by applying Sec. 386(2), Bankruptcy Act, under which the so-called "fraud" (really excusable technical error) is to be cured by making minor modifications in the Plan of Arrangement, thus eliminating the error and permitting a re-confirmation. However, if Appellant's "fraud" was concealment of actual ownership of the community real property by Appellee as a result of a valid Superior Court "award" in the divorce action, the lack of a major asset is obviously not curable, Sec. 386(2) was not properly used, no Arrangement is possible, and the proceeding should be dismissed for lack of assets. Alternatively, if Appellee did not own the property, because the divorce "award" was not an immediate transfer of title, but only a tentative determination of personal rights in the property for future reference, then the Interlocutory Judgment of Divorce containing such "award" was wholly immaterial to the Arrangement proceeding and offered no bar to confirmation; in the absence of any concealment of a material fact, no fraud had occurred, and again no basis would exist for use of Sec. 386(2). In the first appeal, this Court held that confirmation of Arrange-

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Subscription price, \$5.00 per annum in advance. Single copies, 15 cents. Payment in advance. Subscriptions outside the United States, \$7.00 per annum.

ment was properly set aside by the Referee on the ground that non-disclosure of the divorce "award" constituted procedural "fraud" curable under Sec. 386(2), by affirming the District Court's act.

Next, the "fraud" having been cured by disclosure of the divorce "award", Appellant submitted an Amended Plan of Arrangement, but the Referee -- in an order not using the word "fraud" or mentioning Sec. 386(2)-- denied confirmation on the ground it was barred by the Superior Court "award" of the property to Appellee. This cloud on the title the Referee refused to undertake to remove. In the second appeal, this Court, misconstruing Sec. 386(2) and once again refusing to consider the question of title, affirmed the District Court order on the ground that supposed substantive and incurable "fraud" of unstated nature still tainted the Amended Plan of Arrangement, though in the order appealed the Referee had not even mentioned the word "fraud" but dealt only with "award".

In this third appeal, preceding the submission of a new plan, no plan whatever is involved, but only the question of Appellant's title to the major asset of his debtor's estate, the real property. As before, both Referee and District Judge have refused to consider and decide the key question of title as affected by the divorce "award" - now the only issue on appeal, totally disassociated from the question of "fraud" in any plan. In addition to abstaining from the exercise of District Court jurisdiction, they now seek to dismiss the entire proceeding, without jurisdiction for dismissal, without notice to creditors, and with flagrant denial to creditors of the benefits of the Bankruptcy Act. This Court is asked to interpret the "award" by well-settled law

SUMMARY OF ARGUMENT

Abstention from District Court jurisdiction to determine title to the Appellant debtor's assets is improper; title should be determined de novo, without accepting Superior Court decisions as final, and according to Federal and California law. Dismissal of the entire proceeding to avoid determining the title is improper also. Res judicata does not bar this appeal, as no Federal court has yet determined the title to debtor's community real property. The Superior Court "award" to Appellee did not transfer title, but only made a tentative determination of spouse's rights. District Court of Appeal affirmation of the award emphasized that it was not immediately effective; a future transfer of title to Appellee could not bar Appellant's Arrangement, and imposed no lien in favor of Appellee. The Superior Court "award" needs only proper interpretation as a personal judgment to reconcile it with valid confirmation of an Arrangement involving community real property. The question of "fraud" does not arise in this appeal; the "fraud" mentioned in the two previous appeals was "fraud in procurement", or curable technical error, not substantive fraud in any plan of Arrangement, and not fatal fraud requiring dismissal of the proceeding. Actually, the alleged "fraud in procurement" charged was concealment of the immaterial divorce award, therefore no fraud at all; the real property title is in Appellant as debtor in possession, not in Appellee. No equitable relief in conflict with the Bankruptcy Act is justified for Appellee, whose interests and those of the parties' children will best be served by confirmation of Arrangement and restoration of the debtor to his estate.

A R G U M E N T

Part A: The Case at Bar and Applicable Law

APPELLANT IS NOT RELITIGATING CONFIRMATION OF ANY ARRANGEMENT

It is true, as stated by Appellee's Reply Brief, that two prior appeals have resulted in affirmation of Referee's orders respectively setting aside and denying confirmation of certain plans of Arrangement. However, THIS APPEAL directly involves NO PLAN, past or present, but is intended to clear the way for confirmation of a new plan to be considered later, after determination of Appellant's title to the community real property to be involved. There are two elements in any Arrangement with Creditors: (1) What assets does the debtor have that can be involved? (2) What plan can be devised for those assets that will be acceptable to creditors? It has become necessary to deal with these two elements of assets and plan because of a semantic tangle that has developed in this proceeding over the meaning of the words "award" and "fraud".

In both prior appeals, this Court has affirmed the Referee's order on ground that the Arrangement proposed was "tainted with fraud" of undetermined nature, although the Referee's first order, under Sec. 386(2), Bankruptcy Act, necessarily charged Appellant with "fraud in procurement" (i.e., mere technical error, minor and curable) and not fatal substantive fraud in the Arrangement itself. The Referee's second order denying confirmation of an Amended Plan of Arrangement did not use the word "fraud" at all, but this Court affirmed on ground of fraud carried over from the first appeal, though the Referee's ground was doubt concerning title.

The Referee's view -- long distorted by frivolous and confusing arguments offered this Court by Appellee's counsel, and unclear because of the dual significance of the word "fraud" -- is simply that the community real property belongs to Appellee by virtue of a Superior Court divorce award, and therefore (regardless of the rights of creditors) cannot be involved in an Arrangement by the Appellant. The Referee refuses to rule on the validity of the Superior Court award, accepting it in comity and leaving to the District Judge and to this Court the question of title.

What is being litigated in this appeal is merely that question of title, and the validity of the divorce award as a cloud on title, -- not the validity of any plan of Arrangement, or its fraudulence, but simply the single issue: Who owns the community real property? This issue has not yet been decided in any Federal court; Referee and District Judge improperly abstain from making an explicit de novo determination of title as a preliminary step in the proceeding, necessarily preceding confirmation of any Arrangement which involves the disputed property. Instead of applying Federal and State law to determine title, the Referee simply accepts, out of unwarranted comity, the original "award" by the Superior Court, ignores its nullification by the District Court of Appeal, misinterprets it as an immediate transfer of title rather than a tentative determination of future rights of spouses, assumes that it bars confirmation, and therefore seeks to dismiss the proceeding. The paramount and exclusive jurisdiction over a debtor's property conferred by the Bankruptcy Act requires the Referee to remove the cloud on the title by invoking applicable law; instead, he has

imposed a tremendous handicap on Appellant by relegating him to a higher court, with Appellee the prevailing party favored by the usual presumption in favor of the first judgment.

In view of the erroneous findings of substantive fraud improperly made by this Court in the two prior appeals, contrary to the findings of the Referee, Appellant now asks a decision on the single issue of title, free from the complications introduced by a simultaneous consideration of a Plan of Arrangement. This procedure is not relitigation; it is separation of issues in anticipation of the successful confirmation of an Arrangement to which Appellant and his creditors are entitled, thus far thwarted by mishandling of the issues. Up to this point, the Referee has said "No title", the District Judges have said "Pass", and this Court has said "Fraud"; what is needed is consideration of the same issue by all judicial levels.

After evaluation of Appellee's divorce "award", Appellant's title will be established, the issue of "fraud" will disappear, and confirmation of a Modified Plan of Arrangement will proceed without obstacle. However, if Appellee's title to the community real property is affirmed, in fraud of creditors and debtor, no Arrangement will be possible, and dismissal of the proceeding will be proper; but in that event, a century of decisions by the California Supreme Court and the United States Supreme Court must be overturned, the supremacy of State divorce law over Federal bankruptcy law recognized, and principles of jurisdictional law revised, at least in the Ninth Circuit. In the Tenth Circuit, the closely parallel case of *Panton v. Lee* was decided in favor of the debtor, not the wife.

THERE HAS BEEN NO FRAUDULENT PLAN OF ARRANGEMENT IN THIS CASE

It is true that there has been fraud perpetrated in this proceeding, all of it by Appellee's counsel and his client. There has been no "fraudulent Plan of Arrangement", as Appellee's Reply Brief alleges (p.2, line 8), and no fraud of any kind by Appellant. The Referee has recognized no substantive fraud in an Arrangement. His order (composed, of course, by Appellee's counsel) setting aside the original Arrangement reads, in pertinent part (No.18854, Clerk's Transcript, p. 24):

" . . it appearing . . that fraud was practiced by the debtor . . by concealing from this Court all facts of his marriage and divorce in the Superior Court of the State of California, in and for the County of Alameda. . ."

This order was made in accordance with Sec. 386(2), Bankruptcy Act which the Referee read into the record (No. 18854, Reporter's Tr., p. 38, line 10; p. 41). The "fraud" referred to in the Order is therefore necessarily the curable "procedural fraud" of Sec. 386(2) which permits later confirmation of an amended Plan of Arrangement, and cannot be substantive fraud in the Arrangement which would be fatal to the entire proceeding. "Procedural fraud" is limited to mere technical error, excusable and curable, such as omission of a creditor or an asset.

9Collier on Bankruptcy (14th Ed.) 592, 603; ¶ 11.02, 11.04 Obviously, Sec. 386(2) cannot remedy a debtor's loss of his entire estate to his wife; its invocation by the Referee was error, but enabled him to avoid a clash with the Superior Court, in comity.

THEY CAN BE USED IN MANY WAYS TO IMPROVE THE QUALITY OF

THEIR WORK AND TO MAKE THEM MORE EFFECTIVE IN THEIR

WORK. IT IS NOT A SIMPLE MATTER TO DO THIS, BUT THE

USE OF "TECHNICAL" TERMS IS NECESSARY IN MANY CASES.

THESE TERMS ARE USED TO DESCRIBE THE WORK OF THE

TECHNICIAN AND TO MAKE IT CLEAR TO THE READER THAT

THE WORK IS BEING DONE BY A PERSON WHO IS

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The Referee -- and District Judge SWEIGERT-- should have declared the divorce "award" immaterial, its existence no bar to confirmation of an Arrangement involving the community real property, and its non-disclosure not "fraud in procurement". This Court, mistaking "procedural fraud" for "substantive fraud", affirmed the order on the ground that "The Referee found there was fraud in the Arrangement" (No. 18854, Jan. 24, 1964), although the Referee made no such finding of fraud in the arrangement but (necessarily, under Sec. 386(2)) found only fraud in the procedure. Thus, this Court made a new finding, diametrically opposed to the Referee's finding, and based on conflicting and uncertain evidence, as the opinion indicates. Such a substitute finding, invading the province of the trier of fact, this Court has no power to make; it should have remanded the case without affirmation, for clarification.

Smallfield v. Home Ins. Co.(1957) 244 Fed.2nd 337 (CA, 9th)

Since there was no fault in the Arrangement, but only a need for removing the Referee's doubt as to the real property title, Appellant amended the Plan and resubmitted it. The Referee denied confirmation, concluding that (No. 20107, Transcript, p. 33):

"The Judgment of the Superior Court of Alameda County, California, awarding the real property to Frances Kelly Arnold was valid and and bars the involvement of said property in the arrangement proposed by the debtor on June 29, 1964.

That the debtor, J. Howard Arnold, has no right title or interest in and to said real property.

That confirmation of the proposed Amended Plan of Arrangement is barred by the decision of the Court of appeals for the Ninth Circuit."

This Court, affirming the District Court order, disregarded entirely the curative nature of Sec. 386(2) and the basic question of property title on which the Referee rested his decision, and again mistakenly presumed substantive fraud (No. 20107, Feb. 28, 1966):

"The Amended Plan was . . . 'essentially similar' in all material respects to the initial plan, the invalidity of which was finally adjudicated on the former appeal. That determination became and was the law of this case and of course precluded relitigation of the issue."

However, this decision rests on a misconception of the case.

III

THERE HAS BEEN NO FINAL ADJUDICATION OF ANY AND ALL PLANS

Affirmation of an interlocutory order under Sec. 386(2), setting aside a confirmation, was, of course, no "final adjudication" of anything except the invalidity of the procedure leading to that confirmation. Interlocutory judgments supply no basis for res judicata bars to further litigation.

Greenfield v. Mather (1939) 14 Cal. 2nd 228

Ryerson Inc. v. Bullard (1935) 79 Fed. 2nd 192 (CA, 2nd)

Rejection of one plan does not forbid inclusion of any or all of its material features in a later plan, so long as the "fraud in procurement" is eliminated.

". . . Sec. 386(2) continues the administration of the proceeding under Chapter XI and paves the way for the subsequent confirmation of a modified arrangement. . . "

9 Collier on Bankruptcy (14th Ed.) 605; ¶11.04 [2.1]

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rejection of one arrangement does not prevent proposal of another plan, modified to cure the error in procurement. The Court should give debtor and creditors a fair opportunity to arrive at an Arrangement satisfying statutory requirements. (Cf. Opening Brief, pp. 20-21). That has not been done in this proceeding.

Rader v. Boyd (1959) 267 Fed.2nd 911 (CA, 10th)

Jacobs, In re (1917) 241 Fed.2nd 620 (CA, 6th)

Application of Sec. 386(2) to set aside one confirmation does not nullify the entire Arrangement and require dismissal.

"It is quite true that the creditor can have no relief in this situation without proving fraud (in procurement) by the debtor; but it is a mistake to suppose that the whole 'Arrangement' must then be set aside. The first subdivision of Sec. 386 . . . does indeed require that this be done, and that the estate shall be liquidated, and the second presupposes that the plan shall be altered or modified generally; but the third subdivision demands neither, it looks only to the specific correction of the wrong done if that may be accomplished without affecting 'adversely' the interests of innocent parties."

Levenson v. B. & M. Furn.Co. (1941) 120 Fed.2nd 1009 (CA, 2nd)

Appellant is therefore not estopped from proposing a modified plan similar in some or all "material respects" to the previous plans; but which of these material features of the original plan may be retained, and which must be eliminated? This Court's first opinion does not state, nor does the second offer helpful information. No decision on the property title having been made, that issue should be settled first. If Appellant's title was valid, what was the fraud? If invalid, by what laws?

1. The first step in the process of identifying a problem is to determine whether a problem exists. This is done by comparing the current situation with the desired situation. If there is a difference, a problem exists.

[illegible]

ESTOPPEL BY RES JUDICATA IS WHOLLY ABSENT IN THIS APPEAL

The estoppel urged by Appellee's Reply Brief (p.2, lines 8, 11) is without support in prior decisions: determination of the issue of "fraud in procurement" of one Arrangement plan does not settle the issue of property title or the issue of "fraud in procurement" of any later confirmation. Litigation of undecided issues is proper.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit on a different cause of action, the inquiry must always be as to the point or question actually litigated or determined, not what might have been thus litigated and determined."

Cromwell v. Sac County (1876) 94 U.S. 351 at 353

The issue of property title has not been ruled upon by this Court.

"Where a number of grounds for dismissal of an action are urged, an order of a court . . without an indication as to the ground upon which the court acted can not be res judicata of all possible grounds." . .

W.Coast Life Ins. Co. v.Merced Irr. Dist.

(1940) 114 Fed.2nd 654 (CA,9th)

If the judgment rests on procedural irregularity (e.g., fraud in procurement), not on the merits, there is no estoppel.

Thurston v. U.S. (1950) 179 Fed. 2nd 514 (CA,9th)

hus, neither establishment of Appellant's title nor confirmation of a new plan of Arrangement is barred by res judicata doctrine, and both are demanded by stare decisis for the protection of the rights of debtor and creditors. There has been no final adjudication of any present issue in this proceeding.

V

STARE DECISIS DOCTRINE DEMANDS DENIAL OF APPELLEE'S TITLE CLAIM

After 5½ years of study of the law of this case, Appellant can cite no reported appellate decision, State or Federal, permitting a wife to secure ownership of community property free of creditors' claims. The following decisions uniformly deny the wife's claim:

Hawk v. Hawk (1900) 102 Fed. 679 (DC, Ark.)

Gibbons v. Goldsmith (1915) 222 Fed.826 (CA,9th) (Wash.)

Gibbons v. Dexter Horton Bk.(1915) 225 Fed.424 (CA,9th)

Hannah v. Swift (1932) 61 Fed.2nd 307 (CA,9th) (Calif.)

Hornsby v. Hornsby (1936) 127 Tex.474, 93 SW 2nd 379

Potts, In re (1944) 142 Fed. 2nd.883 (DC,Ky)

Cummings, In re (1949) 84 Fed. Supp.65 (DC, Cal.)

Todd v. Todd (1955) 133 Colo. 1, 391 Pac.2nd 386

Panton v. Lee (1958) 261 Fed.2nd 183 (CA, 10th) (Okla.)

Britt v. Damson (1964) 334 Fed.2nd 896 (CA, 9th)

In the case at bar, stare decisis is the applicable doctrine, not res judicata, and calls for reversal of the District Court order.

VI

THE COMMUNITY REAL PROPERTY WAS NOT AWARDED TO APPELLEE

The Interlocutory Judgment of Divorce rendered Oct. 22, 1962, reads

in pertinent part:

"It IS FURTHER ORDERED AND DECREED that the community property of the parties hereto be awarded as follows:

To plaintiff: FRANCES KELLY ARNOLD:

All that real property situated in the City of Albany, County of Alameda, State of California, described as follows:

Lot 46, as said lot is shown on the map of "Terminal Junction Tract, Albany, California, 1914", filed August 13, 1914, in book 28 of Maps, at page 72, in the office of County Recorder of Alameda County,

and the household furniture and furnishings therein contained; together with the immediate and exclusive possession of said real property."

Though signed by Judge KRONINGER, this judgment was composed by Appellee's counsel and reflects his wishful thinking rather than settled California law; which permits no such title transfer. The real property described is that involved in the Arrangement, and composes most of Appellant debtor's estate. Reasons why Appellee did NOT acquire this property in fee, free and clear of creditors' claims, have been discussed (Opening Brief, pp. 9-17). They are:

1) Transfer of assets to wife and debts to husband is against law in California, and void; the debts must be considered.

2) The District Court of Appeal modified the property disposal provisions of the Superior Court judgment to take effect on Final Decree, not immediately; the award was tentative and prospective.

3) The "Award" was a personal judgment, dealing with spouses' rights, not with property title free of creditors' claims.

4) The real property had been seized by the U.S. District Court

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- 4) Filing of Appellant debtor's original petition June 19, 1962.
- 5) Prior seizure by the Superior Court had not occurred; if it had, that court would have been displaced as custodian by the U.S. District Court, acting under the paramount and exclusive power given it by Congress in the Bankruptcy Act.
- 6) After June 19, 1962, any seizure by the Superior Court for the purpose of transferring title to Appellee, or imposing a lien in her favor, was unlawful invasion of Federal court custody.
- 7) Appellee had no prior lien or claim against the property, as a wife, which would warrant relinquishment of control by U.S. District Court, in proceedings under the Bankruptcy Act.

The contention of Appellee's counsel, echoed by the Referee, that the "award" transferred title to Appellee and thus barred confirmation of Appellant's Arrangement with Creditors is preposterous and without standing in either California and Federal law. In fact, even Appellee's counsel himself at one time denied his contention:

"It was never contended at any time, or at all, in the bankruptcy proceedings that this property was exclusively the property of the wife, since it could not have become her property until the Interlocutory period developed into a Final Judgment of Divorce." (No. 18854, Reply Brief, p. 2)

Does Appellant seek to "attack the State court's decision" (Appellee's Reply Brief, p. 2, line 15); he asks only that this court make the proper interpretation of the Superior Court "award" which the Referee refuses to make, despite District Court of Appellate denial that any immediate transfer of title to property was included in the Interlocutory Judgment (Opening Brief, p.13).

"In sum, the interlocutory decree is merely a determination that after the lapse of a year the parties would, if no impediments have arisen, be entitled to a decree dissolving the marital relation and disposing of the community property in manner described in the interlocutory decree. Its provisions are not operative until the entry of the final decree."

Boeson Estate (1927) 201 Cal. 36

et, in the order now on appeal, the Referee states (Tr., pp.18-19):

"The Court finds: . . . That the Superior Court . . . awarded the real property . . . to the debtor's . . . wife, Frances K. Arnold. The Court concludes that the title to the real property has previously been decided."

at of the District Court of Appeal decision (Opening Brief, p.13) postponing the effectiveness of the "award"? What of the necessity of a judgment as a basis for res judicata? What of the legal power of the Superior Court to make an award of title? The referee does not consider these factors, which would upset his theory of the case and require a decision for Appellant. The District Court of Appeal decision of Feb. 14, 1964, was made after the first decision of this Court on Jan. 24, 1964, but before the Referee's denial of confirmation on Nov. 10, 1964, but did not affect his decision, although it completely nullified his notion that the Superior Court effected a title transfer on Oct. 23, 1962, and thus barred confirmation of Arrangement. The Referee erred in two separate ways: (A) Interpreting the "award" as an immediate transfer of property title, valid though in fraud of creditors, and (B) accepting in comity such an "award" as a bar to confirmation, without independent scrutiny of its validity under Federal law.

VII

EQUITIES OF THE CASE REQUIRE NO DEPARTURE FROM SETTLED LAW

Appellee's counsel, finding the facts and the law wholly against his case, habitually indulges in viciously libelous attacks upon Appellant, with no ill effects upon his success in this litigation. Appellee's Reply Brief herein is no exception to his many falsifications, and seeks to arouse unwarranted sympathy for his client and antagonism toward Appellant. The six years of litigation which he decries is directly due to his tenacity in breaking up Appellant's home for financial gain derived from the Svengali-and-Tilby relationship he has established with Appellee. Six years of his machinations have produced incalculable damage to the lives of the six persons whose home he has insisted on breaking; continuation of the status quo for his benefit financially is grossly inequitable to the family, and in no way justifies the complete departure from settled law that is necessary to support Appellee's case.

VIII

NO HOME OF FOUR MINOR CHILDREN IS INVOLVED IN THIS PROCEEDING

Three of the four children who were minors in 1961-62 have come of age and, together with Appellee, have largely departed from home.

Jeffrey, 14, has lived in a fatherless home since the age of 10, limits his associations largely to boys from broken homes, does poorly in school, lives largely without supervision at home (e.g., operates a power saw at will), has lost his newspaper route through misbehavior, cannot play football because of poor health (perhaps traceable to poor eating habits and lack of sleep).

Joellen, 18, cannot attend U.C. because of poor high-school

rades, insisted on going away to school (to escape intolerable conditions, as her sister before her did?), now attends college in Florida, where she lives with her married sister. (Children in this family have I.Q. ratings of 125 to 142, and are all college material intellectually if not emotionally.)

Jonathan, 21, made no credits in high school during two years after filing of divorce action, left home at 16 because of dissension with his mother after father's eviction, joined Army at 17, lived at home as college student Sept. 1966 to Oct. 1967 but earned no credits; now married, working as gas station attendant.

James, 24, twice dropped out of college; assumed responsibility as head of household after father's eviction in March, 1963, but disappeared in April, 1966 (believed by Appellant to have suffered a nervous breakdown at that time); with no prior criminal record except motor vehicle offenses, wrote many bad checks in April, September, December 1966; a convicted felon, served 8½ months in Alameda County Jail, 1967, and awaits further felony prosecution in the state of Washington.

Frances K. Arnold, 53, Appellee, University graduate in Home Economics but an unwilling homemaker; an exponent of ultra-permissive child (non-)rearing, discourages her children's education; has spent nearly all evenings away from home since April, 1957, ostensibly to earn money as practical nurse and companion, but actually to avoid stress from undisciplined children; sued for divorce in 1961 to escape possible support obligation if husband became an invalid; has long been mentally ill, her condition worsened since 1961 by medically untreated menopause and addiction to psychotoxic amphetamine "pep-pills"; worked as upholstery seamstress, May to

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ON THE 10TH DAY OF JANUARY, 1900

BEFORE ME, the undersigned authority

do hereby certify that

the within and foregoing is a true and correct copy

of the original on file in my office

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ly 1962 only; now employed by Berkeley Humane Society.

These are the people for whom Appellee's counsel is so solicitous. The "4 minor children" have dwindled to one, living in a 9-room house with his convicted-felon adult brother, with their mother feeding them for dinner -- a fine family life! From April 1966 to Sept. 1966, Jeffrey and Joellen, then 12 and 16, lived alone without adult supervision at night. It is Appellant's intention to restore parental authority to this tragically broken home-- not, as Appellee's counsel hints, to evict wife and children from their home (as she has done to him). Appellant urges that settled law be followed toward a decision in this Court; such a decision will do violence to equitable principles, which may be disregarded. If, however, the equities are considered, the sixth member of the family group ought not to be disregarded:

J. Howard Arnold, 60, Appellant, former University professor, public official; self-employed engineer, author, publisher; from 1958 to 1961, increasingly ill with nervous exhaustion and colitis from stress of adjusting to undisciplined children and paranoid schizophrenic wife, and seriously ill in 1961; still in precarious health from nervous stress of home disruption and futile litigation; still handicapped by loss of office furniture and equipment in 1963 by wife's illegal seizure, as well as loss of office on first floor of residence; has spent a total of 29 days in jail as debtor in Possession whom the Federal courts refused to protect from Superior Court usurpations of power; lived in home with wife for 16 months after filing of divorce action and 5 months after interlocutory Judgment, without incident, after 25 years of quarrel-free marriage

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VIII

APPELLEE'S FINANCIAL CONDITION IS BETTER THAN REPRESENTED

The phrase "reager earnings as a seamstress" grossly falsifies Appellee's economic position (Appellee's Reply Brief, p.3, line 8), and for that reason has long been a favorite expression of her attorney. She worked as a seamstress --not at home, but in an upholstery shop -- for only 3 months in 1962. Her income now, as a teacher, is much better. Much of the time since 1963, the household income has exceeded \$1,000 a month. Unfortunately, both Appellee and son James are spendthrifts, and in the absence of Appellant's stabilizing influence, income gives little indication of living standards. Appellee has squandered \$6,000 on payments to attorney and building contractor for needless and damaging alterations to family and home. She bought a new car in 1966, and has several times explained to Wisconsin to visit her mother. She is in good physical and financial health, despite her mental condition, and can offer no adequate excuse for swindling her husband and his relatives by opposing the Arrangement with Creditors, which seeks to secure loans directly traceable to her long-continued mental illness and default as a homemaker, 1949-63.

It is grossly untrue that Appellant is in contempt of the Superior Court for refusal to pay support money. He has never refused, and never been found in contempt -- although 3 abortive contempt proceedings have been brought against him, not to recover money but to prevent litigation of this proceeding by jailing Appellant, in abuse of process. Appellant owes Appellee nothing, but has a small credit balance owing to him.

The law obligates a Debtor in Possession to collect rent on property in his estate occupied by tenants (Sec.70a(5),(6), Bankr.Act).

Shapers, In re (1936) 86 Fed.2nd 506 ()

Van Rooy, In re (1937) 21 Fed. Supp.431,(DC, Ohio)

Eastern Constr.Co.v. Trustee (1932) 242 Ky.648, 47 SW 2nd 67

Taxes and loan installments paid by Appellee constitute offsets against rent due Appellant; unpaid support money is another offset, credited by Appellant husband to himself as debtor in lieu of rent. (The first loan outstanding in 1963 was very small, about \$500.)

IX

REHABILITATION OF DEBTOR IS NOT A FUNCTION OF THE ARRANGEMENT Appellee's Reply Brief (p.2, lines 13-17) incorrectly applies a Chapter X requirement to a Chapter XI plan, which need not rehabilitate the debtor, but need only be feasible.

Slumberland Bedding Co., In re (1953)115 Fed.Supp.39 (Appellant's plan is self-executing and unquestionably feasible. Confirmation would also remedy the adverse influence on his rehabilitation presented by loss of his home and office to Appellee.

CONCLUSION

The District Court order should be reversed and remanded with instructions to proceed in accordance with settled Federal and California law.

Respectfully submitted,

Dated: Dec.21,1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

THE TIVVAT

NO. 21855
21855A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER CARBAJAL-PÖRTILLO,
RAFAEL VEGA-PICOS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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JUL 31 1967

FILED

JUL 25 1967

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IN THE UNITED STATES COURT OF APPEALS
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JAVIER CARBAJAL-PORTILLO,
RAFAEL VEGA-PICOS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the Southern District of California, adjudging both appellants to be guilty as charged in all three counts of the indictment, following trial by jury (C.T. ^{1/}15, 16).

The offenses occurred in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

^{1/}

"C.T." refers to the Clerk's Transcript.

STATEMENT OF THE CASE

Both appellants were charged in each count of a three-count indictment returned on July 20, 1966, by the Federal Grand Jury for the Southern District of California, Southern Division (C.T. 5).

The first count alleged that on June 10, 1966, both appellants knowingly imported and brought approximately sixteen ounces of heroin into the United States contrary to law. (C.T. 5).

The second count alleged that on June 10, 1966, both appellants knowingly concealed and facilitated the transportation and concealment of approximately sixteen ounces of heroin which the appellants knew had been imported and brought into the United States contrary to law. (C. T. 6).

The third and last count alleged that on June 10, 1966, both appellants knowingly and unlawfully sold and facilitated the sale to Ernest Halcon of approximately sixteen ounces of heroin which both appellants knew had been imported into the United States contrary to law. (C. T. 7).

Jury trial of both appellants commenced on September 7, 1966, as to all three counts before United States District Judge Luther W. Youngdahl. (C. T. 10). Both appellants were found guilty of all three counts on September 12, 1966 (R. T. 15, 16). ^{2/}

Thereafter on September 30, 1966, appellant Carbajal was sentenced to five years on Count One, and five years on Counts Two and Three to run concurrently to each other and consecutive to Count One, making a total of

^{2/} "R.T." refers to the Reporter's Transcript.

ten years (C.T. 17), and on September 30, 1966, appellant Vega was sentenced to five years on each of Counts One, Two and Three to run concurrently, making a total of five years.

Both appellants thereafter filed a notice of appeal on November 7, 1966. (C. T. 22, 23).

III

ERROR SPECIFIED

1. The Court erred as a matter of law in not granting appellant Carbajal's motion for dismissal, on the grounds of entrapment.

2. The Court erred in denying appellant Vega's motion for a new trial which was based on the grounds that the government had failed to sustain its burden of proving that appellant Vega had knowledge or possession of the drug.

IV

STATEMENT OF THE FACTS

Ernest Halcon, an agent for the California Department of Justice, Bureau of Narcotic Enforcement, met with appellant Carbajal on June 9, 1966, at 9:45 p.m., in front of Kresge's, 200 block on First Avenue, Calexico, California. (R. T. 32, 33).

He had been instructed by Leland Riggs, Customs Agent, to proceed to that location at 9:30 p.m. and that a person would appear there who would ask for Rico and would possibly have some heroin to sell (R.T.43, 45). Agent Riggs had received this information from a reliable and confidential informant (R.T. 112).

Appellant Carbajal approached Halcon, working undercover, at 9:45 p.m. in the company of an unidentified person who Carbajal explained "was alright". (R.T. 33, 40).

Carbajal asked Halcon if his name was Rico. Halcon answered in the affirmative. Carbajal asked if Halcon was interested in purchasing a good quantity of "cheva". (R.T. 33). "Cheva" means heroin (R.T. 39).

Halcon said he was if the price was right and asked appellant Carbajal how much was involved. Carbajal said twenty-two ounces at \$350.00 per ounce. (R.T. 34). This is a fair price in quantities. (R.T. 41). Halcon ordered sixteen ounces at that price for delivery June 10 (the following day) at 12:30 p.m. at First and Pauline Streets in Calexico. Carbajal then departed in the direction of the border. (R.T. 34).

The next day Halcon was at First and Pauline Streets in Calexico at 12:30 p.m. and appellant Carbajal was already there. Carbajal said the "cheva" (heroin) would arrive by water truck shortly, then inquired if "Rico" wanted European heroin at \$12,000 per kilo (R.T. 35). Halcon testified this was about forty ounces and a fair price in that quantity (R.T. 41). He said it would take three weeks to a month. Carbajal added that his brother in Mazatlan raises poppies. (R. T. 35).

Carbajal departed at 12:52 p.m. for the stated purpose of locating his associate who was overdue with the "cheva". Halcon said he would meet Carbajal at 2:30. Appellant walked toward Mexico (R.T. 35).

Halcon returned to First and Pauline Streets at 2:30 p.m. Carbajal appeared at 2:45 p.m. on foot and announced the "cheva" is here and asked

"Rico" (Halcon) if he had the money. Halcon said the money was in the trunk and asked if the stuff was there. (R.T. 36).

Appellant Vega was standing six to seven feet away. (R.T. 50). Vega is a water truck driver and crosses up to three times a day (R.T. 136, 139). He answers "The thing is in the car," - pointing toward a car. (R. T. 36).

Carbajal and Halcon drove over to the car (R. T. 36). Halcon said to Vega "Is it all there?" to which Vega replied "I will get it."

Vega joined Carbajal at the rear of the Chevrolet automobile, the trunk was opened (R.T. 36, 76) and Halcon observed them engage in conversation (R.T. 36).

Carbajal returned to Halcon's car with a coffee can containing three rubber containers.

Halcon began counting out the money to pay for the heroin and gave a signal to the surveilling officers who arrested both appellants and undercover agent Halcon. (R.T. 37).

V

ARGUMENT

A. APPELLANT CARBAJAL WAS NOT ENTRAPPED.

Entrapment is usually a question of fact, not of law. See:

Enciso v. United States, 370 F.2d 749 (9th Cir. 1967).

Masciale v. United States, 356 U.S. 386 (1958).

It is a question of law only where the evidence on the question is substantially undisputed.

Enciso, supra.

Sherman v. United States, 356, U. S. 369 (1958).

Unless it can be decided as a matter of law, the issue of whether a defendant has been unlawfully entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

Sherman, supra.

Carson v. United States, 310 F.2d 558 (9th Cir. 1962).

Rush v. United States, 370 F.2d 520 (8th Cir. 1967).

It is clear from the record that this was not a case of entrapment as a matter of law. That the trial judge had rejected entrapment as a defense is also clear. Just prior to sentencing the defendants, Judge Youngdahl said:

"It is my opinion, counsel, so far as the defendant, Carbajal, is concerned, this wasn't a one-shot thing. He knew the routine pretty well, and I don't share your opinion that it was an isolated thing. I am under the impression he was pretty much of a runner and he was fortunate to get away with things before." (R.T. 205).

Looking at the case in the light most favorable to the defendants, the evidence as to entrapment was at best conflicting. This being so, the judge properly did not decide the issue as one of law, but rather submitted it to the trier of fact with the proper instruction to the effect that once the issue had been raised, the government had the burden of proving beyond a reasonable doubt that Carbajal was not entrapped. (R.T. 194-195).

"Unlawful entrapment is the solicitation of an otherwise innocent

person to commit a crime solely for the purpose of prosecution.

It arises where the criminal purpose or design originated in the minds of government officials and such criminal purpose or design is implanted in the mind of an otherwise innocent person, the object being his prosecution."

Rogers v. United States, 367 F.2d 998 (8th Cir. 1966).

"It is well settled that the fact that the officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

Sorrells v. United States, 287 U.S. 435 at 441-442 (1932).

The record contains much testimony supporting the contentions of the government that appellant Carbajal was not an innocent person, that he had a predisposition to commit the crime, and that hence he was not entrapped illegally.

At the time of their first meeting Carbajal approached agent Halcon and asked him if he wanted to buy "cheva" (R. T. 33, 34). "Cheva" is a slang expression for heroin, used in the Mexican drug traffic (R. T. 39). Agent Halcon testified that Carbajal offered him European heroin for

future delivery, and quoted a price of \$12,000 per kilo (R.T. 35). This is a good indication that Carbajal was not just on a "one-shot" venture, but was rather an active participant in the Mexican drug traffic. Carbajal's testimony showed a familiarity with the city of Calexico, even though he denied having been there before (R.T. 126, 127). It is apparent from the verdict that the jury believed the government testimony and found it to have discharged the burden of proof imposed.

The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government.

Glasser v. United States, 315 U. S. 60, 80 (1942).

Sherman v. United States, 241 F.2d 329 (9th Cir. 1957).

Appellant Carbajal also paradoxically raises as a defense the claim that while he admits the intent to transport the heroin between cities in Mexico, he at no time had any intention of entering the United States and violating its laws, until allegedly he was induced to do so by agents of the United States.

^{3/}
(A. B. 3) .

No case was found precisely in point. However, several provide guidance by analogy. In United States v. Becker, 62 F.2d 1007 (2nd Cir. 1933), the appellant argued that although engaged in the commission of local obscenity crimes, he had not committed the Federal crimes charged until entrapped into doing so by postal inspectors. The Court of Appeals, at page 1009, rejected the argument, Judge Learned Hand writing as follows:

^{3/}

"A. B." refers to Appellant's Brief.

"The crimes in which he had been engaged were offenses against another sovereign, though the distinction was not suggested at the trial. If the excuses for instigation includes the accused's 'predisposition' to the crime charged, the point is a bad one anyway. One who distributes obscene pamphlets locally is not morally averse to sending them to another state The whole doctrine derives from a spontaneous moral revulsion against using the powers of government to beguile innocent though ductile, persons into lapses which they might otherwise resist. Such an emotion is out of place, if they are already embarked in conduct morally indistinguishable, and of the same kind We conclude that Becker was not 'entrapped' into the crime." (Emphasis added.)

To the same effect in United States v. Edwards, 366 F.2d 853 (2nd Cir. 1966). In that case, entrapment was alleged because agents switched the place of an illegal transaction in securities from New York to New Jersey to make it an interstate offense. The court held, however, that the government did no more than afford the opportunity and facilities for the commission of the offense charged, and that the participants were awaiting any propitious opportunity, and never considered themselves limited by New York's boundaries. Therefore, there was no illegal entrapment.

In Sherman v. United States, 241 F.2d 329 (9th Cir. 1957), cert. den., 354 U. S. 911, rehearing denied, 355 U. S. 852 (1957), this court cited

Becker, supra, to the effect that an entrapment defense is not supported where the evidence shows a design to commit the crime charged "or similar crimes. . . ."

Appellant's claim that he was willing to commit a crime in Mexico, but not in the United States is belied by common sense. The heroin was transported from the interior of Mexico to Mexicali, on the United States - Mexico border. He was willing to sell to an American buyer. It is almost a matter of judicial notice that narcotics moving along this route are never intended to come to rest in Mexicali, but in fact are destined to reach the lucrative U. S. market.

It is submitted that the law of entrapment was designed to protect the innocent man who is lured into the commission of crime by the Government, not the guilty man already engaged in similar criminal activities. The facts of this case leave little question as to appellant Carbajal's being a member of the latter.

B. THE EVIDENCE AGAINST APPELLANT VEGA WAS SUFFICIENT TO CONVICT.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U. S. 60 (1942).

Stein v. United States, 337 F.2d 14 (9th Cir. 1964).

While no conspiracy between appellants Vega and Carbajal was charged in the indictment, the facts as determined by the jury leave no doubt

as to the existence of one, this being the case, appellant Carbajal's statements to agent Halcon concerning Vega's participation are admissible against him (Vega) as admissions of a co-conspirator in furtherance of the conspiracy.

See: Shibley v. United States, 237 F.2d 327 (9th Cir. 1956)

Barrett v. United States, 171 F.2d 721, 722 (9th Cir. 1949).

Lutwak v. United States, 344 U. S. 604 (1952).

Agent Halcon testified that Carbajal told him that the heroin was being brought across the border by a water truck driver (R.T. 35, 48). Later, Vega testified: "I am a salesman of drinking water in Mexicali". (R.T. 136). He again admitted he was a water truck driver, but denied that appellant Carbajal knew this. (R.T. 142).

Throughout his testimony, appellant Carbajal denied that Vega was aware of the importation of the heroin. He stated that he "put the merchandise in the car without him knowing it" (R. T. 125), that Vega did not know the matter was contraband (R.T. 126), and that Vega did not know heroin was placed in his car. (R.T. 135).

Both appellants also testified that Vega was not at his car when Carbajal removed the contraband (R.T. 127-128, 140-141). This testimony was contradicted by the testimony of Agents Halcon and Landa. Agent Halcon testified that Vega told him, "the thing is in the car" and "I will get it", and then proceeded to the car with Carbajal. (R. T. 36). Agent Landa, who was observing the transaction from across the street, testified that both Vega and Carbajal were at Vega's car, first opening the trunk, then the passenger's door.

(R. T. 76). Vega then walked about fifteen feet toward Agent Halcon's vehicle which was only thirty feet away. (R. T. 82).

The verdict of the jury then, had to turn on whether they believed the testimony of the experienced government agents, or that of the two appellants, men in fear of the loss of their freedom. It is obvious that the many contradictions in appellant's testimony impeached them as witnesses, and caused the jury to doubt the credibility of what they said. Since the jury had the opportunity of observing the demeanor of the witnesses, it is submitted that their verdict should not be overturned barring overwhelming evidence in appellants' favor.

It is patently unbelievable that appellant Vega could be ignorant of the transaction and yet raise no question when Carbajal appeared at the park with agent Halcon, took the coffee can containing the contraband from the car while Vega was present, and then proceeded to enter Halcon's car for the actual sale.

Appellant Vega alleges that the government failed to prove possession of the heroin by him.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F. 2d 114 (9th Cir. 1962).

In this case, Vega's custody of the car and the fact that he was driving are circumstantial evidence that he had knowing possession of the contraband. When this was bulwarked by the direct evidence presented by government agents as to Vega's comments and his presence at the car when the contraband was removed, it is clear that the jury could find substantial evidence on which to base a finding of possession necessary for conviction.

C. THE APPEAL WAS NOT TIMELY.

Rule 37(a)(2) , Federal Rules of Criminal Procedure provides:

"An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from , but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion"

In this case, judgment as to both defendants was entered on September 30, 1966. On that same date, a motion for a new trial with respect to appellant Vega alone was made, and summarily denied by the trial court. Notice of appeal was not filed until November 7, 1966, thirty-eight days after judgment, and far beyond the allowable period. Appellants were represented at all times by competent counsel in the person of Mr. Michael S. Hegner.

Timely notice of appeal must be filed in District Court to confer jurisdiction in the Court of Appeals.

Coppedge v. United States, 369 U.S. 438 (1962).

The Court of Appeals has no jurisdiction of appeals where notice required by Rule 37(a)(2) is not filed within the time specified.

United States v. Creighton, 359 F.2d 429 (3rd Cir. 1966).

The Court of Appeals has no authority in the absence of a timely appeal, to vacate a judgment of conviction.

Russell v. United States, 308 F.2d 79 (9th Cir. 1962)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

SHELBY R. GOTT,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


SHELBY R. GOTT

NO. 21856

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD DWAYNE SPRADLIN,)
)
 Appellant,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Appellee.)
 _____)

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTIONAL FACTS

Under the authority of Title 28, United States Code, Section 1291, and Rule 27 (a), Federal Rules of Criminal Procedure, an appeal was taken to this Honorable Court by Notice of Appeal filed April 3, 1967 (R. 167, 168) from the judgment and sentence of the United States District Court for the District of Nevada, at Las Vegas, Nevada, adjudging the defendant guilty of Interstate Transportation of a Stolen Motor Vehicle, Title 18, United States Code Section 2312, and sentencing the Defendant to serve a term of five years, and from the Court's refusal to grant defendant's motion for a mistrial, motions to dismiss for lack of jurisdiction, and motions for judgment of acquittal, and for error in the giving and refusing to give certain instructions to the jury.

The defendant is presently confined at the Federal Correctional Institution at Lompoc, California, pursuant to the judgment and commitment of the Court (R. 164).

By order of the lower court, this appeal was permitted in forma pauperis (R. 165, 166), and counsel for appellant is continuing to serve under the order of appointment of counsel made by the lower court (R. 13).

STATEMENT OF THE CASE

THE CHARGE

A federal grand jury indictment was returned and filed in the United States District Court for the District of Nevada, at Las Vegas, Nevada, on October 13, 1966, against the defendant HOWARD DWAYNE SPRADLIN, Appellant herein, charging that on or about September 23, 1966, he knowingly transported a stolen automobile in interstate commerce from Flagstaff, Arizona, to Las Vegas, Nevada, in violation of Title 18, United States Code, Section 2312 (R. p.5).

Defendant was arraigned and pleaded Not Guilty on October 31, 1966 (R. p. 18).

ARREST, CUSTODY AND COMMITMENT

The defendant has gone through three trials in the United States District Court for the District of Nevada at Las Vegas, Nevada, under the above-described charge. Because of that fact, and the indigency of the defendant which prevented him from posting a bail bond, or making cash deposit, as of the date of this writing defendant has been continuously in jail and penitentiary custody for a period of time just 50 days short of one year.

Pursuant to warrant of arrest, the defendant was

taken into custody of the United States Marshall on October 20, 1966 (R. p. 19). Bail was fixed at \$1,500.00 (R. p. 12) by the United States Commissioner calling for appearance bond with sufficient solvent sureties or cash deposit of \$1,500.00 (R. p. 12). Defendant was financially unable to employ counsel and the Court ordered the appointment of the undersigned as the attorney for the defendant (R. p. 13).

Defendant remained continuously in custody of the United States Marshal at the Clark County Jail in Las Vegas, Nevada, until following his conviction after the third trial he was removed to the Federal Correctional Institution at Lompoc, California, on or about June 13, 1967, where he has since been in custody continuously to present date under the judgment and commitment of the lower court (R. p. 164). At the time of sentencing, the Court raised the bond to \$2,500.00 pending appeal, which bond defendant could not post because of lack of funds.

BASIC CONTENTIONS OF DEFENDANT

1. The proof was not sufficient to establish the commission of the crime charged, particularly in that the proof did not establish the following:

(a) that the automobile in question was a stolen

automobile;

(b) that the defendant had knowledge the automobile was stolen;

(c) that with such knowledge, the defendant wilfully transported the stolen automobile in interstate commerce.

2. Under the Due Process Clause of the Fifth Amendment to the United States Constitution, and under the particular circumstances of this case, the jury should have been, but were not, plainly instructed that before they could draw any inferences against the defendant by reason of his possession of the automobile in question, they must first determine that the automobile was stolen, and then they might, but were not required to, infer from the defendant's possession of it that he stole it; that only then would they be permitted, but not required, to draw the further inference that the defendant knowingly transported such stolen automobile in interstate commerce.

The instructions given to the jury allowed all of the ultimate facts to be presumed against defendant rather than proved and permitted the defendant to be convicted on a presumption of guilt.

3. The defendant was deprived of a fair trial by reason of prejudicial error in the charge to the jury, which was, taken as a whole, confusing and misleading, and in

addition:

(a) the instruction given by the court dealing with "Judging the Evidence" nullified the instructions given by the court concerning proof beyond a reasonable doubt;

(b) the court's instruction on "inferred" criminal intent allowed the jury to "infer" guilt in a prosecution requiring proof of specific criminal intent;

(c) the instruction defining the elements of the crime was so worded as to convey to the jury an assumption of fact on the part of the Court that the defendant transported the automobile in interstate commerce.

4. The refusal of the trial court to allow defendant to examine a portion of the pre-sentence report and confer with his counsel regarding it, deprived the defendant of the benefit of counsel at the rendition of sentence, in violation of the Sixth Amendment to the United States Constitution.

5. In the disposition of this appeal, the reversal of defendant's conviction on any ground should be accompanied with an order directing the defendant's discharge from custody, because a remand of the case for a new trial, after he has already gone through three trials and remained in custody either in jail or the federal correctional institution every day since his arrest on October 13, 1966, would constitute a denial of his right to a speedy trial, in violation of the

Sixth Amendment to the United States Constitution, and inflict upon him cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution.

SUMMARY OF EVIDENCE

William Egan, a resident of Flagstaff, Arizona, owned a 1961 Oldsmobile automobile. (Tr. p. 28, lines 15-16). On September 15, 1966, he requested that an agent of Morris Motors Company in Flagstaff take the car down to the company's lot to appraise the car for trade-in purposes. (Tr. p. 29, lines 13-15).

Mr. McCoy, the general manager of Morris Motors, obtained the car from Mr. Egan's residence on September 15, 1966, and drove it down to Morris Motors (Tr. p. 33, lines 14-18) which was located on United States Highway No. 66, the main street through Flagstaff, in the central business district of the city (Tr. p. 39, lines 15-25 - p. 40, line 1). Mr. McCoy turned the car over to the company's service manager, and after the service manager examined it, the car was parked on the "back lot", a parking area maintained by Morris Motors adjacent to its body shop. One side of the lot bordered on a public alley, and was unenclosed; the opposing side was also unenclosed; one side adjoined a vacant lot across which there was a fence. (Tr. p. 34, lines 2-15). The ignition key was placed inside the car, either over the sun visor or under the seat. (Tr. p. 34, lines 16-19).

On September 26, 1967, when another automobile dealer in Flagstaff telephoned for permission to examine the car, Mr. McCoy discovered it was missing from the lot. (Tr. p. 34, lines 24-25 - p. 34, lines 1-3; p. 34, lines 17-20).

Mr. McCoy did not give anyone permission to use the car (Tr. p. 36, lines 11-14); however, Mr. McCoy did not have exclusive possession and control of the car--during the week beginning September 19, 1966, he was in Los Angeles, California, attending a convention, during which time his duties were performed by Mr. Morris, the automobile dealer and a part owner of the company. (Tr. p. 35, lines 10-16; p. 38, lines 16-21). In the operation of the business it sometimes became necessary to move an automobile from one place to another, in which event the car would be moved by the porters, service manager or mechanics. Such an occasion could have arisen while Mr. McCoy was away from the business without his knowledge, (Tr. p. 40, line 25; p. 39, lines 1-20). In fact, such an occasion could have arisen without his knowledge while Mr. McCoy was at the place of business (Tr. p. 41, lines 11-13). Mr. McCoy didn't know whether or not any of the porters, service manager or mechanics had been required to move the car or use it for any purpose (Tr. p. 42, lines 3-7).

Although Mr. Morris continued to occupy the same position with the company at the time of the Third Trial as he had occupied in September, 1966, as did Mr. Steinspring (Tr. p. 38, lines 7-25; p. 39, line 1), neither they nor any other person from Morris Motors were called to testify on

behalf of the Government.

On September 26, 1966, the defendant was arrested at Las Vegas, Nevada, at about 6:00 o'clock P.M., and charged with an offense against the city of driving an automobile under the influence of alcoholic intoxicants (Tr. p. 53, line 14-24; p. 55, lines 11-15; p. 60, lines 2-6).

The police officer ran a test on the defendant for intoxication and determined that he was incapable of operating a motor vehicle (Tr. p. 59, line 24 - p. 60, line 1). Much of the officer's testimony was concerned with the defendant's operation of the car from the time the officer first began to pursue the car on motorcycle until the time defendant pulled the car onto a side street and stopped (Tr. p. 52-54).

The officer talked to the defendant about five (5) minutes and then went back to his motorcycle to write out a toll slip for the impounding of the car; during which time, the defendant ran away from the scene (Tr. p. 53, lines 21-25, p. 54, lines 1-3; lines 23-25, p. 55, lines 1-15). The defendant was taken into custody again following chase about two blocks away, and the officer said the defendant appeared to be totally exhausted.

The drunken condition of the defendant was the subject of instruction to the jury on the issue of fact as to whether or not the defendant was in possession of the vehicle within the meaning of the law.

As to the evidence tending to show flight by the defendant, the jury was also instructed that the flight must

be referrable to the particular crime charged by the present indictment and the instruction covered the issue whether or not the defendant's intoxication deprived his flight from being an intentional one and whether or not his flight was referrable to the present crime. (Tr. p. 112, line 14 - p. 113, line 14). In this connection the police officer testified he did not verbally accuse or arrest the defendant under the Dyre Act (Tr. p. 60, lines 7-11).

The final witness to testify was an FBI agent who identified the vehicle driven by the defendant and impounded by the Las Vegas City Police as that belonging to William Egan of Flagstaff.

The defendant did not testify and did not offer any witnesses.

While this summation of the evidence has been drawn from the proceedings at the Third Trial, it does not differ substantially from the testimony at the preceding trials.

THE FIRST TRIAL

The First Trial commenced before a jury on December 6, 1966 (R. p. 42). The government called several witnesses; the defendant did not testify and produced no witnesses in his behalf (R. p. 42). At the close of all the evidence, defendant moved for judgment of acquittal, which was denied (R. p. 42). Following arguments of counsel and the charge to the jury the case was submitted and resulted in a mistrial (R. p. 42), by reason of the inability of the jury to reach a verdict (R. p. 42).

MOTION FOR ACQUITTAL AFTER DISCHARGE OF JURY

WITHOUT RETURNING VERDICT

On December 14, 1966, defendant filed a renewed Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure (R. pp. 44, 55-56) contending the evidence was not such that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, as was argued at the close of all the evidence (R. p. 55) and further contending that under Rule 29, supra, which authorizes the renewal of a motion for judgment of acquittal when the jury has been discharged for inability to arrive at a verdict, where the proof is circumstantial, the trial judge should acquit the

defendant unless defendant's guilt is the only reasonable hypothesis under the evidence, (R. p. 55) although guilt may also be a reasonable hypothesis, which contention was resisted by the government (R. p. 58-60) which maintained the same test applied to the trial court in passing on such motion where a mistrial resulted from a "hung jury," as applied when the motion was considered after the return of a guilty verdict, wherein the trial judge does not pass upon the "credibility of the witnesses or the weight of the evidence," but must view the evidence and the inferences that may be justifiably drawn therefrom in the light most favorable to the Government." (R. p. 60, lines 1-6).

The Motion for Judgment of Acquittal under Rule 29 came on for hearing and was denied on January 3, 1967 (R. p. 65).

THE SECOND TRIAL

The Second Trial commenced before a jury on January 12, 1967. The same witnesses testified for the government as at the First Trial, except for Charles McGlinchey, as already noted. The defendant did not take the stand or offer any evidence in his behalf (R. p. 66). At the close of all the evidence, defendant moved for dismissal on jurisdictional grounds, and also moved for judgment of acquittal, both of

which motions were denied (R. p. 66).

Following arguments and the charge to the jury, the case was submitted; the jury deliberated about two hours and then notified the Court it desired "clarification on the indictment, regarding Title 18, Section 2312, United States Code." (R. p. 78).

Court was re-convened and the foreman of the jury stated the concern of the jury as follows:

"JURY FOREMAN HESTER: There appears to be a question of, some feel that the jury must find that this man either did or did not transport the vehicle himself knowing that it was stolen. There seems to be others who, by the very fact that he was in possession of an automobile which was stolen, would seem to be the proof that we are looking for, and this is the point that we are in doubt about." (R. p. 117, lines 9-16).

The Court charged the jury, in substance, that it should determine from the evidence whether the motor vehicle was stolen in Arizona, but that they were not required to find that the defendant stole the motor vehicle--just that it was stolen (R. p. 118, lines 17-22); that if the jury from all the evidence found beyond a reasonable doubt that the car was stolen in Arizona, that secondly the jury must find beyond

a reasonable doubt that the defendant was in possession of the car in Nevada, and that if the jury "did find both of these elements, that the automobile was stolen in Arizona and that the defendant was found to be in possession of the automobile here in Nevada, beyond a reasonable doubt, then you may, . . . (ommitting definition of inference) . . . you may then draw the inference, first that the defendant knew that the automobile was a stolen motor vehicle and, second, you may also infer that the defendant transported it in interstate commerce, that is from Arizona to Nevada, or that he caused it to be transported." (R. p. 119, lines 2-13).

Following objections by defendant to the giving of these instructions, the refusal to give other instructions, and the procedure employed by the Court in refusing to allow defendant's counsel opportunity to submit proposed language to the Court for the supplemental charge (Tr. p. 119, beginning line 24, through p. 122), the Court further instructed the jury as follows:

"THE COURT: Let me cover the matter of this ground again so there is no question in your minds about the law.

"I first said that if you found beyond a reasonable doubt the car was stolen in Arizona, second, if you found beyond a reasonable doubt that

the defendant was found in possession of the car here in Nevada, that you might make the inference that the defendant knew the car was stolen and also that he transported or caused to be transported-- I left out something--you should also find in addition to finding the car was stolen in Arizona and that the defendant was in possession here, you must also find beyond a reasonable doubt that the car was transported somehow by someone from Arizona to Nevada." (R. p. 124, lines 1-5, through line 9 on p. 33) (Emphasis supplied)

The jury was excused for further deliberations, after further objections were made to the foregoing charge by defendant (R. p. 126, line 16 through page 127, line 11).

The jury indicated the supplemental instructions had resolved their doubts (Tr. p. 28, line 14), the jurors were excused for further deliberations and returned back into court after an interval of ten minutes with a verdict of guilty (R. pp. 127, 128, and 79).

The defendant, on January 19, 1967, filed a Motion for Judgment of Acquittal, renewing the same motion made at the close of all the evidence (R. p. 80) and a Motion for New Trial grounded upon charged prejudicial error in the instructions given by the Court and the Court's refusal of certain

instructions requested by defendant (R. p. 90). These motions were heard by the Court on February 20, 1967 (R. p. 140) and stood submitted to the Court, which later that same day filed a Minute Order denying the Motion for Judgment of Acquittal and granting the Motion for a New Trial (R. p. 142).

THE THIRD TRIAL

The Third Trial commenced before a jury on March 28, 1967. The Government made virtually the same case it had made at the Second Trial. The defendant did not testify and offered no evidence in his behalf. At the close of all the evidence, the defendant moved the court to dismiss the case for lack of jurisdiction (Tr. p. 62, line 24--p. 69, line 19), which was denied. Defendant next moved for Judgment of Acquittal under Rule 29, which was denied by the Court (Tr. p. 69, line 22--p. 70, line 19).

After the arguments and the charge to the jury, the case was submitted and the jury returned into court after deliberating about an hour and forty minutes, with a guilty verdict (Tr. p. 121, line 21--p. 122, line 22).

The Court discharged the jury and then proceeded immediately with the sentencing of defendant (Tr. p. 123-127; R. p. 151) and filed its final judgment and commitment adjudging the defendant guilty of interstate transportation of

a stolen motor vehicle, in violation of Title 18, Section 2312, United States Code, and committing him to the custody of the Attorney General for imprisonment for a period of five years, to become eligible for parole pursuant to Title 18, Section 4208(a), United States Code, at such times as the Board of Parole may determine. (R. p. 164).

MOTION FOR MISTRIAL

In the Opening Statement for the Government, counsel made the following statement to the jury:

"Now, I would like to emphasize that the indictment here does not allege that the defendant personally stole the car, and that is not involved in the crime before you. The only crime with which we are concerned is whether or not this defendant transported the car knowing it to be stolen--

(Interrupted by objection of defense counsel)"

(Tr. pp. 19-20)

The ground of objection was that counsel, contrary to law, had informed the jury the issue of whether or not defendant stole the car was not involved in the crime charged. As will be brought out in the Argument herein, if the bare circumstance of possession of automobile in a foreign state is sufficient to support an inference of interstate transportation

by the possessor, that inference depends upon and must arise out of and with an inference that the possessor stole the automobile; especially where there is no proof as to the theft or interstate transportation aside from the fact of unauthorized possession.

The issue of theft of the car, and the proof which would be made by the Government, as well as the contentions to be made by defendant on this point, were matters of record made long since, and many times over, in the earlier trials. and were well known to Court and counsel. The court refused defense counsel an opportunity to phrase specific objection to this statement and relegated counsel to the recourse of making her own opening statement (Tr. p. 20, lines 4-14), although obviously this invited counsel to argue a legal dispute to the jury. Therefore, counsel moved for a mistrial (Tr. p. 20, lines 15-24, which the Court denied and in so doing, approved and further emphasized the error, by saying of the statement objected to: "That is the law. . ." (Tr. p. 20, line 25).

This error, under the circumstances of this case, was highly prejudicial to defendant, was not mitigated by the evidence adduced by the government, nor cured by the Court's charge to the jury, which charge is considered at a later point herein.

MOTION FOR DISMISSAL

At the conclusion of the Government's case the defendant moved for dismissal of the case, urging, in substance, the following: (1) The proof did not establish that the automobile had been stolen by anybody; (2) The proof did not establish interstate transportation of the vehicle by the defendant, or that the automobile was still a part of interstate transportation when defendant was observed driving it; (3) The circumstance of unexplained possession of recently stolen property may, together with other circumstances proved (and not so proved or present in this case), may give rise to an inference that the possessor stole the property; but it cannot give rise to an inference that the possessor transported the property in interstate commerce unless the jury finds from the evidence beyond a reasonable doubt that the property was stolen and the possessor stole it; then, the jury may draw an inference that the possessor transported the property in interstate commerce; (4) That the circumstance of unexplained possession alone, in the absence of other criminating evidence, or, in effect, that proof of possession, which is not an element of the crime of interstate transportation of a stolen automobile, cannot be made to constitute proof of all of the elements of the crime, even though that possession stand

unexplained; and (5) That all reported Dyre Act prosecutions in modern years involved proof of directly criminating matters and circumstances, in addition to bare, unexplained possession; and (6) That the defendant could not be required to explain his possession or prove any part of the Government's case.

(Tr. pp. 63-69)*

This motion was summarily denied by the Court, which stated no response was needed from the Government to the motion.

(Tr. p. 69, lines 17-19).

*ERRATA: Tr. p. 66, line 22: "Wallenbarg" should be
"Bollenbach,"
Tr. p. 67, line 2: "Wallenbarg" should be
"Bollenbach."
Tr. p. 68, line 9: "Traverse" should be
"Travers."
Tr. p. 68, line 11: "Mirandie" should be
"Morandy."
Tr. p. 68, line 12: "175 Federal Second"
should be "170 F. 2d 5."

MOTION FOR ACQUITTAL

The defendant moved the Court for judgment of acquittal at the close of the Government's evidence, which was denied (Tr. p. 70, lines 3-19).

The defendant rested without offering any evidence, and formally renewed his motion for judgment of acquittal, which was again denied (Tr. p. 76, lines 2-8).

CHARGE TO JURY

The Statement of Specific Errors in the court's charge to the jury is deferred to those portions of the Specification of Errors and Argument dealing with the instructions. However, it should be noted here that defendant's counsel did not make a record of objection at the Third Trial to the court's giving of the following instruction:

"As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the evidence in this case leads the jury to draw a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from the acts knowingly done or knowingly omitted by the accused."

(Tr. p. 106, lines 20-25 - p. 107, lines 1-4).

The defendant contends that the error in giving this charge in this case, which required proof of specific intent and in which the ultimate facts required for conviction were not proven facts but "referred" or "presumed" facts, constituted plain error under Rule 52 (b), Federal Rules of Civil Procedure, 18 U.S.C. The failure to make objection, however, was attributable to the procedures followed by the court in the settling of instructions and in making the charge to the jury and not intentional on the part of defendant or his counsel as shown hereafter.

In making the record of objections at the Second Trial, the same identical instruction was given (R. p. 100, lines 10-17) over the following objection of the defendant:

"We object to the giving of the Court's instruction on general intent for the reason that this instruction includes a presumption that every person intends the consequences of their acts, for the reason that this is a case which does require specific intent, it requires that the acts be knowingly and willfully done under the statutory definitions of a crime, and we think that the jury may probably be confused as to the issue of specific intent." (R. p. 112, lines 13-21).

The procedures on settling instructions are reported beginning at Tr. p. 70, beginning at line 20 and continuing through line 6 on p. 75. The government did not request any

instructions. The court drew its instructions from Mathes & Devitt, Federal Jury Practice and Instructions, except those portions of defendant's proposed instructions accepted by the court. Thus, the court announced section numbers from the foregoing book in this fashion, for example: "I am going to give 7.01, 7.03, 8.01, 8.02, 8.03, 8.04" (Tr. p. 21, lines 2-3). The court did not hear complete objections of counsel at this time (Tr. p. 72, lines 21-23) but allowed counsel to make objections at the bench following the giving of instructions to the jury (Tr. p. 75, lines 2-6).

Following the charge to the jury, respective counsel and the court reporter approached the bench where objections were received by the court in the presence but out of the hearing of the jury, which sat some ten (10) to twelve (12) feet away. This procedure, in which counsel has never been provided with a typed transcript of the court's charge and in which the record of objections is made in a closed huddle before the bench with the reporter struggling to hear and record the proceedings on his stenotype device while the jurors wait a short distance away, is not a procedure which lends itself to either order or clarity. It is small wonder that in the giving of the charge counsel may sometimes "lose his place" so to speak in the book of Mathes & Devitt.

THE SENTENCING

The jury returned into Court with its verdict at 4:45 o'clock P.M. on the day of the Third Trial (R. p. 150) The verdict was filed, and the Jury was excused (Tr. p. 122, lines 20-25), with the announcement made by the court, before the jurors left the room: "The Court will remain in session." (Tr. p. 123, line 1).

Immediately after the jury had cleared the courtroom, the Court announced that on January 30, 1967, the Probation Officer submitted a pre-sentence report to the Court and that the Court was going to sentence the defendant (Tr. p. 123, lines 3-6). Defense counsel informed the Court that she had not had an opportunity to examine the report, although she had earlier been notified the report was available, but since sentence was not to be imposed at that time, she did not examine it. That on the day she did attempt to contact the Probation Officer, the office was closed for a federal holiday (Tr. 123, lines 6-15).

The Court thereupon remanded the defendant to custody and ordered a ten minute recess for defendant's attorney to examine the report. (Tr. 123, lines 16-19) Court recessed at 4:50 o'clock P.M. and reconvened at 5:00 o'clock P.M. (R. p. 151).

When Court reconvened defense counsel and defendant were asked to stand at the podium, whereupon defense counsel informed the Court she wanted to make a request of the Court

before imposition of sentence. After informing counsel she would have time to be heard, the Court immediately commenced the sentencing procedure and then allowed defense counsel to make a statement "in mitigation of punishment," with the direction: "Now, Mrs. Quintana." (Tr. p. 124, lines 1-13).

In compliance with the court's mandate, defense counsel made a brief statement directed to mitigation of punishment and then requested that the defendant be allowed to examine a portion of the pre-sentence report:

"MRS. QUINTANA: . . .

The request which I had to make of the Court is that some of the matters which are mentioned in the list of offenses on the record of the defendant are not known to me to have been committed by him or not to have been committed by him. This covers approximately two pages, I believe, in the report, and I request permission of the Court that defendant be allowed to examine that list to see if there is anything that he wishes to say with regard to any of those matters.

"THE COURT: No. That request will be denied."

(Tr. p. 125, lines 2-10)

Sentence was imposed after a further brief colloquy between the Court and defense counsel on mitigation of punishment. (Tr. p. 126, lines 9-20).

Attached to this Brief, as appendices "A" and "B"

appear, respectively, the notification defense counsel received from the probation officer in advance of the sentencing scheduled after the Second Trial, (which of course was vacated in the face of the new trial ordered by the Court) and the Affidavit of defense counsel showing that if there was any lack of diligence on her part in not earlier examining the report, it was not more than excusable neglect; and that by remanding the defendant to custody during the ten-minute allowed counsel to examine the report, the defendant was removed from the courtroom and placed in a barred, locked cell across the hall in the U. S. Marshall's office, until Court reconvened, and that defendant's counsel had no opportunity whatever to discuss the report with the defendant with regard to what might be said or done in his behalf concerning the highly prejudicial record of prior offenses.

Defense counsel did not realize and therefore did not alert the Court to the crucial prejudicial effect of the sentencing procedure under the above circumstances; nevertheless that effect was to deprive the defendant of the benefit of counsel at his sentencing, which is urged herein as a constitutional defect vitiating the conviction and judgment and sentence.

SPECIFICATION OF ERRORS

1. The Court erred in denying defendant's Motion for Judgment of Acquittal made at the close of all the evidence in the First Trial, and renewed after the discharge of the jury without returning a verdict.

2. The Court erred in denying defendant's Motion for Judgment of Acquittal made at the conclusion of all the evidence and renewed after the jury's verdict in the Second Trial.

3. The Court erred in refusing to declare a mistrial on defendant's motion therefor at the Third Trial by reason of the erroneous statement of law made by government counsel in opening argument.

4. The Court erred in denying defendant's Motion for Dismissal of the case made at the conclusion of the government's case in the Third Trial.

5. The Court erred in denying the defendant's Motion for Judgment of Acquittal made at the close of the government's evidence in the Third Trial, and renewed at the close of all the evidence.

6. The trial Court erred in giving the following instruction to the jury at the Third Trial:

"As a general rule, it is reasonable to infer

that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the evidence in this case leads the jury to draw a different or contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from the acts knowingly done or knowingly omitted by the accused." (Tr. p. 106, beginning at line 10, through line 4 on p. 107).

Due to the circumstances set forth under that portion of the Statement of the Case designated The Charge to the Jury, defense counsel inadvertently failed to make a record of objection to this portion of the charge.

Nevertheless, the same charge had been given at the Second Trial, (R. p. 100, lines 10-17), over the following objection of defendant:

"We object to the giving of the Court's instruction on general intent for the reason that this instruction includes a presumption that every person intends the consequences of their acts, for the reason that this is a case which does require

specific intent, it requires that the acts be knowingly and wilfully done under the statutory definitions of a crime, and we think that the jury may probably be confused as to the issue of specific intent." (R. p. 112, lines 13-21).

Moreover, the giving of the objectionable instruction, considered in the context of the other instructions given and the issues raised under the circumstances of this case, constituted plain error within the meaning of Rule 52(b), Federal Rules of Civil Procedure, 18 U.S.C.⁴

7. The trial Court erred in giving the following instruction to the jury, set forth in context, with the erroneous portion underscored:

"There are three essential elements that the Government is required to prove in order to establish the offense charged in the indictment. Each of these elements must be proved beyond a reasonable doubt. The first element, that the motor vehicle was stolen. If you don't find in this case that the motor vehicle was stolen, or if you have a reasonable doubt that the motor vehicle was stolen, you should stop right there and you must acquit the defendant. So this is the first element, if the motor vehicle was stolen.

7. The trial court erred in giving the following instruction to the jury, set forth in context, with the erroneous portion underscored:

"There are three essential elements that the Government is required to prove in order to establish the offense charged in the indictment. Each of these elements must be proved beyond a reasonable doubt. The first element, that the motor vehicle was stolen. If you don't find in this case that the motor vehicle was stolen, or if you have a reasonable doubt that the motor vehicle was stolen, you should stop right there and you must acquit the defendant. So this is the first element, if the motor vehicle was stolen.

"The second element, did the defendant transport the automobile in interstate commerce.

"Third, that when so transported the defendant knew that the motor vehicle had been stolen.

"The offense is complete when the three elements just stated have been established by the evidence in the case beyond a reasonable doubt. The proof need not show who may have stolen the motor vehicle."

(Tr. p. 108, beginning at line 11, through line 3 of p. 109).

The defendant requested that the Court give Defendant's Proposed Instruction No. A, as follows:

"Three essential elements are required to be proved in order to establish the offense charged in the indictment:

"First: That the motor vehicle was stolen;

"Second: That the defendant transported the automobile in interstate commerce; and

"Third: That when so transported the defendant knew the motor vehicle had been stolen.

"The burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged." (R. p. 154)

The defendant's proposed instructions Nos. B and C are also pertinent to this specification of error, but are set forth under Specification of Error No. 8 immediately following, and are incorporated herein by reference to avoid repetition.

When the Court announced its intention with regard to this instruction, the following occurred:

"THE COURT . . .

"Now, then, I will give in lieu of 32.05, defense counsel wishes it, defendant's proposed "A" which restates the elements. I am going to add, --in other words you make three elements out of it instead of two, but I am going to add from 32.05 The court's reference here is to Section 32.05, Mathes & Devitt, Federal Jury Practice and Instructions, p. 271.7 this sentence, 'the offense is completed when the three elements just stated are established by the evidence

in the case and proof need not show who may have stolen the motor vehicle.'

"Now, do you want me to give--I am giving you a choice of--

"MRS. QUINTANA: Yes. I would like to have you give defendant's "A", but I would like the record to show that we do not request that the court give the additional language quoted and will have to object to that.

"THE COURT: Well, if I give your S, I include the additional language. Now, if you want me to give 23, 32.05 as it reads or your instruction as I have amended it, that is the only choice I am giving you. Which one do you want?

"MRS. QUINTANA: Your Honor, we have requested defendant's instruction number "A", and we stand on that.

"THE COURT: All right.

"MRS. QUINTANA: Then you will be giving 32.05?

"THE COURT: Then I will give 13.07, 12, . . . "

(Tr. p. 73, lines 1 through 25).

Later on, the Court expressly ruled it would give Defendant's Proposed Instruction No. A, with the addition of the last sentence hereinabove discussed (Tr. p. 74, lines 11-24).

Although the above colloquy does not contain the specific ground of objection to the sentence "added" by the

Court, it had been argued over and over again by defendant that unless there was independent proof the automobile was stolen by somebody, before the jury could permissibly infer the defendant transported the automobile in interstate commerce with knowledge it was stolen, the jury would have to determine from all the evidence, beyond a reasonable doubt, that the defendant stole the automobile. See, for example, the discussion between Court and counsel regarding the giving by the Court of Defendant's Proposed Instruction C, described under Specification of Error No. 8 (Tr. p. 120, line 19 through p. 121, line 9).

The instruction considered under this Specification of Error is further objectionable in that the phrasing of the second element of the crime in the form of a question, followed by the phrasing of the third element of the crime as an affirmative statement, that is,

". . . So this is the first element, if the motor vehicle was stolen.

"The second element, did the defendant transport the automobile in interstate commerce.

"Third, that when so transported the defendant knew that the motor vehicle had been stolen . . ."

(Tr. p. 108, lines 19-25)

necessarily expressed to the jury a determination of fact made by the court, that the defendant transported the automobile in interstate commerce.

The defendant's attorney, relying on the announced decision of the Court that when it defined the elements of the crime it would use Defendant's Proposed Instruction No. A, heard what she expected to hear, instead of what was said, and was not aware of the crucial and prejudicially erroneous departure made by the Court from the language of Defendant's Proposed Instruction No. A, and therefore did not interpose an objection at the conclusion of the charge before the case was submitted to the jury.

Nevertheless, since the language of the instruction was not made known to counsel at the time of the "settling" of the instructions, and since Defendant's Proposed Instruction No. A. properly defined the elements of the crime, defendant is properly entitled to assign the same as error without resort to the Rule of Plain Error (Rule 52 (b), Federal Rules of Criminal Procedure, 18 U.S.C.), but if the Court deem otherwise, then defendant urges this Specification of Error under said Rule and Doctrine.

8. The trial court erred in refusing to give the charge set forth in Defendant's Proposed Instruction No. B (R. p. 155) and in giving in lieu thereof the instructions commencing at page 109, line 17, of the Trnascript of Trial Proceedings, and continuing down through Tr. p. 111, line 14.

The instruction given by the Court was drawn from §10.10, Mathes & Devitt, Federal Jury Practice and Instructions, pp. 131-132, and reads as follows, in objectionable part:

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"Possession in one state of property recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.

*** (Omitting paragraph dealing with the term 'recently' and informing the jury the longer the period of time since theft, the more doubtful the inference which may be drawn.)

"If you should find beyond a reasonable doubt from the evidence in the case that the motor vehicle described in the indictment was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in the possession of the accused in another state than that which it was stolen, the jury would ordinarily be

justified in drawing from those facts the inference that the motor vehicle was transported, or caused to be transported, in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently-stolen property by the accused in such other state is explained to the satisfaction of the jury by other facts and circumstances in the case.

"In considering whether possession of recently stolen property has been satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional Right the accused need not take the witness stand and testify. Possession may be satisfactorily explained through other circumstances, other evidence independent of any testimony of the accused.

"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from possession of recently-stolen property. If any possession the accused may have had of recently-stolen property is consistent with innocence, the jury should acquit the accused." (Tr. p. 109, line 17--p. 111, line 14)

The foregoing instruction was objected to in the

following language:

"I object to the giving of the Court's instruction on Section 10.10 from Mathes and Devitt in that it is

confusing, that it does not specify to the jury what facts must be established before any inferences may be drawn and the order in which dual inferences may permissibly be drawn." (Tr. p. 119, lines 8-13).

The defendant also objected to the refusal of the Court to charge the language of Defendant's Proposed Instruction No. B, for the reason that "it more accurately and with less confusion states the law as applied to the facts of this case." (Tr. p. 119, lines 6-7).

Omitting that portion of the proposed instruction defining an "inference," and distinguishing a "presumption" from an "inference," the proposed instruction states:

"The unexplained possession of recently stolen property is a fact which, if established by the evidence, will support an inference that the possessor is guilty of the theft.

* * *

"Therefore, if it is proved beyond a reasonable doubt that the defendant was in possession of a recently stolen automobile, you may draw the inference, in the light of all the other evidence, if such possession is unexplained and is inconsistent with the defendant's innocence, that the defendant stole the automobile, but you are not required to draw this inference." (R. p. 155).

It should be explained that defendant's objections regarding the charge given and the charge refused were

affected by the fact the Court ruled that it would give, and did give, Defendant's Proposed Instruction No. C. (Tr. p. 112, lines 5-13), which reads as follows:

"If you draw an inference that the defendant is guilty of stealing the automobile on the basis of proof of the facts that he was found in possession of an automobile recently stolen in another state, which possession is unexplained and in the light of all the other evidence is inconsistent with the defendant's innocence, then you are permitted, but not required, to draw a further inference that the defendant transported the automobile in interstate commerce, with knowledge of its stolen character."

It was later brought out that the giving of the foregoing instruction resulted from mistake or inadvertence on the part of the Court:

"THE COURT: I gave your "C" and I don't think I read it carefully. Going back, now, you start, 'If you draw an inference that the defendant is guilty of stealing the automobile,' that issue is the very thing we have been concerned with through these trials.

MRS. QUINTANA: I thought that is why you gave it.

THE COURT: No. But I have given now. I was going to give it primarily because it emphasized the fact that they may draw an inference, but not required to. But I thought it read something to this effect, if you find that an automobile has been stolen, and draw

that, and then go on to infer the other things. But it is too late. It is prejudicial to the Government to give it. But it shouldn't have been given, in fairness to the Government. It is certainly not prejudicial to the defendant's benefit." (Tr. p. 120, line 19--p. 121, line 9).

9. The trial court erred in giving the instruction appearing on page 116 of the Trial Transcript between lines 2 and 10, as follows:

"There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

"If the accused be proved guilty, say so. If not proved guilty, say so.

"Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

"Remember also that the question before you can never be: Will the Government win or lose the case? The Government always wins when Justice is done,

regardless of whether the verdict be guilty or not guilty."

The defendant objected to the giving of this instruction at Tr. p. 120, lines 5-16, as follows:

"It applies to the proof in this case, not the standard which is required in all criminal cases, but simply the standard that applies in civil cases, that this is manifestly erroneous and is uniquely prejudicial to the defendant in this case for the reason that the proof is circumstantial, and, more so than in the case of direct evidence, the jury is required to abide by the universal requirement that proof be established beyond a reasonable doubt and that a reasonable doubt is such a doubt as would prevent the person from proceeding in respect of the serious [affairs] of his own existence, and they are not entitled to apply the civil standard in their consideration of the evidence."

10. The trial court erred in refusing the request that defendant be allowed to examine the portion of the presentence report containing the list of offenses purportedly committed by defendant and allowing him to determine, with his counsel, what might be done or said regarding them, thereby abusing his judicial discretion and denying the benefit of counsel to defendant at the time of sentencing.

ARGUMENT

S U M M A R Y

The government's case was not sufficient to establish the violation of Section 2312, Title 18, United States Code, and was not sufficient to prove the defendant guilty of violating the same.

Where the sole criminating circumstance established in the case is that the defendant was apprehended in a state of alcoholic intoxication driving an automobile owned by the citizen of a neighboring state, and arrested on a charge of driving while under the influence of intoxicants, this circumstance is not sufficient evidence, even with any lawful inferences flowing therefrom, to establish that the car was stolen, that the defendant stole it, and that having stolen it in Arizona, he must have driven it to Nevada in interstate commerce with knowledge that it was stolen, with wilfull and felonious intent.

The defendant should have had judgment of acquittal when he applied for it at the close of the government's case in the First Trial. Instead, after going through two more trials he stands convicted on the same insufficient evidence, and in another month and a half will have served a year in federal custody in the county jail and federal correctional

institution.

The defendant's minor premise is, if he be incorrect in considering himself entitled to dismissal or acquittal, that numerous prejudicial errors in the Court's charge to the jury, and the deprivation of counsel resulting from the manner in which the Court conducted the procedure at the sentencing of the defendant, are cause for the reversal of his conviction, and that a remand of this case for another trial would be cruel and unusual punishment, proscribed by the Eighth Amendment to the Constitution of the United States.

POINT ONE: A CONVICTION WHICH RESTS UPON A PRESUMPTION OF FACT IS CONSTITUTIONALLY INFIRM WHEN THE SUBSIDIARY FACTS AND CIRCUMSTANCES REQUIRED TO SUPPORT THE PRESUMPTION OF FACT, ARE NOT FAIRLY ESTABLISHED BY THE EVIDENCE.

The evidence in this case has been summarized under the Statement of the Case, beginning at page 40.

The instructions given to the jury on the inferences they might draw from the defendant's possession of recently stolen property are set forth under Specification of Error No. 8 and appear at Tr. p. 109, line 17 - p. 111, line 14; Tr. p. 112, lines 5-13.

The test of the sufficiency of the evidence to support a conviction, is whether reasonable minds could find that the evidence exludes every reasonable hypothesis but that of guilt. THOMAS v. U.S., CA 9th, 1966, 369 F. 2d 373.

Where the evidence is circumstantial, the question of its sufficiency is whether the total evidence, including reasonable inferences, when put together, is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. DE VORE v. UNITED STATES, CA 9th, 1966, 368 F.2d 396.

The acceptability of an inference drawn depends upon whether it has been founded upon fact, regardless of whether such fact has been arrived at by direct or circumstantial evidence. TOLIVER v. UNITED STATES, CA 9th, 1955, 224 F2d 742.

If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. MANN v. UNITED STATES, CA 5th, 1963, 819 F2d 404.

The foregoing ruling was made with respect to this instruction to the jury in a prosecution for income tax evasion:

"It is reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possession like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

The Court noted other tax evasion cases, including BLOCK v. UNITED STATES, CA 9th, 1963, 221 F2d 786, in which convictions had been reversed for error the charge because it, in effect, told the jury it could draw the conclusion the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed, and thereby shifted the burden of proof from the government to the defendant. It then said of the above charge:

"The instructions in the instant case go beyond the bounds of the charge set out in the

above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results."

The courts, as well as state and federal legislative bodies, are limited in the manner and degree to which they can provide proof of certain facts constitutes presumptive evidence of the ultimate facts on which guilt is predicated. In the case of TOT v. UNITED STATES, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), the court declared:

" . . . Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the facts proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of the lack

lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The Court rejected the argument that the defendant has the better means of information is sufficient ground to support the presumption, saying:

"Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision."

The Due Process Clause of the Fifth Amendment to the United States Constitution operates alike upon presumptions of ultimate fact which are judicially declared and applied, as upon those which are established by the Congress. COLON-ROSICH v. PEOPLE OF PUERTO RICO, CA 1st, 1958, 256 F2d 393.

By the same principle, if the facts proved in a particular case do not afford sufficient base for the application of such a presumption of fact, then, if the jury has been allowed to predicate guilt on presumed ultimate facts, its verdict of guilty contravenes the presumption of the defendant's innocence, the burden of the government to establish the corpus delicti, and the right of the defendant to be confronted by the witnesses against him, in violation of the Due Process Clause, and when the evidence is not sufficient on which to base the presumption of facts or to establish the defendant's guilt independent of any presumption, the verdict is without substantial evidence to support it.

A recent decision of this Honorable Court is highly instructive of the correctness of the foregoing paragraph.

In the case of ERWING v. UNITED STATES, CA 9th, 1963, 323 F.2d 674, the defendant was prosecuted for receiving, concealing, transporting and facilitating the transportation and concealment of cocaine, knowing the same to have been unlawfully imported in the United States. The proof was that the defendant possessed a quantity of cocaine hydrochloride. It was not disputed that such substance constituted a narcotic drug under the provisions of the Statute. However, the proof was that cocaine hydrochloride is a manufactured product, legally manufactured in the United States by several pharmaceutical manufacturers, and is a drug dispensed in drugstores, hospitals and clinics all over the United States for medicinal purposes. The government did not prove that any cocaine hydrochloride was imported into the United States, legally or illegally, or that cocaine hydrochloride was illegally manufactured in the United States from coca leaves, legally or illegally imported. Therefore, there was no rational connection between the unexplained possession of the cocaine hydrochloride and the fact that such narcotic drug was illegally imported to the knowledge of the defendant. Since the defendant did not possess true contraband, i.e., coca leaves, and since the federal statute did not purport to penalize possession of narcotic drugs, the defendant's conviction on the basis of the statutory presumption from unexplained possession was reversed with instructions for dismissal of the indictment, the Court saying:

" . . . To do otherwise would be to disregard

appellant's constitutional right to due process and extend the jurisdiction of the Federal Courts beyond constitutional limits."

Thus, even though the substance the defendant possessed in ERWING constituted a narcotic drug within the meaning of the federal statute, and even though the presumption created by that statute provided that "Whenever . . . the defendant is shown to have or have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury," (21 U.S.C. § 174), the evidence was not sufficient to warrant application of the statutory presumption, or its use in support of the conviction.

The authority of ERWING and the cases cited hereinabove, direct that before it may lawfully be presumed that the defendant wilfully transported a stolen automobile in interstate commerce with knowledge it was a stolen automobile upon proof that he was in recent possession of the stolen property in a state other than that of its ownership, the government must certainly prove the automobile was stolen.

In the instant case, the circumstantial evidence is not sufficient to establish the automobile was stolen. It was last known to be on the automobile lot at Morris Motors on September 16, 1967. It was discovered missing from the lot on September 26, 1967. Only one employee or agent of the motor company testified, and he admitted that the car, in the usual cause of business, could have been legitimately moved or used

by porters, the service manager or the mechanics, without his knowledge, both while he was in California during the week beginning September 19, 1967, and also during the time when he was present attending to his duties. The testimony of this witness that he personally did not authorize anybody to move or use the car, did not establish that someone else in authority in the company had not authorized the movement of the vehicle-- either Mr. Morris, the automobile dealer who performed the manager's duties while the manager attended the convention in Los Angeles, or another employee who found legitimate occasion to move or use the car. There is no evidence showing when or under what circumstances the car was removed from the motor company lot. The defendant, along with thousands of other people, was in the city of Flagstaff, Arizona, on September 22, 1966, but his whereabouts from that point on until September 26, 1966, are unknown.

There was no evidence connecting or tending to connect the defendant with the car while defendant was in Arizona; there was no evidence connecting or tending to connect the defendant with the immediate premises or neighborhood of the motor car company, or any of its employees. After a completely normal motel tenancy extending from September 9 to September 22, 1966, at Flagstaff, the defendant paid his bill. The motel registration reflected the defendant or the other person occupying the room with him had with them a 1956 Cadillac, black and white. True, the lessee-manager of the motel did not see either of them in possession of this car, but he

didn't see them register-in at the motel either.

When the defendant was arrested for driving the automobile while intoxicated, he parked the car at the street curb, got out of it, and there is not one iota of evidence that he claimed to own the vehicle and withhold its possession from the owner, or that he had performed any acts to conceal the identity of the vehicle, such as altering the license plates, etc.

The evidence relied on by the government to establish possession and flight is equivocal. The defendant's drunkenness was uncontroverted. The officer stated the defendant was "incapable" of driving an automobile. If he was capable of knowing possession, and if he was capable of voluntary flight, such flight is directly referable to the charge on which he was being arrested, not that contained in the present indictment.

It should also be borne in mind that the car was returned to Flagstaff by an agent of Morris Motors Company; and that the owner, Mr. Egan, received the full value of it as credit on a trade-in when he bought another car from a company other than Morris Motors.

A stolen automobile, as the court instructed the jury (Tr. p. 108, lines 3-10) is one which is acquired, or is thereafter possessed as the result of some wrongful or dishonest act, whereby another person either wilfully obtains, or thereafter wilfully retains, its possession, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership.

The circumstances in this case are not sufficient to establish that the car was stolen by anybody, or that it was stolen by the defendant--Indeed, by its insistence that it was under no obligation to prove who stole the car, the Government has tacitly admitted its evidence was not sufficient to prove the defendant stole it.

While the circumstances may be sufficient to give rise to a suspicion that the car was stolen, criminal liability cannot rest on suspicion and conjecture.

This case is comparable to the cases of VIRGIN ISLANDS v. TORRES, D.C., V.I., (1958) 161 F.Supp. 699; BENTON v. UNITED STATES, D.C. App. (1956), 232 F2d 341; and SERIO v. UNITED STATES, C.A.D.C. (1967), 377 F2d 936.

In the VIRGIN ISLANDS case a statute provided that any person charged with having possession of or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained who could not account to the satisfaction of the court how he came by the same, should be fined or imprisoned. In holding this statute contravened the Due Process Clause, which in a criminal case includes the presumption the accused is innocent until he has been proved to be guilty beyond a reasonable doubt, the court said:

" . . . The statute here involved puts upon the accused the burden of satisfying the court that his possession or transportation of an article which is merely suspected of having been stolen or unlawfully obtained was not in fact unlawful.

All that the statute requires the Government to prove is that the accused was in possession of the article or that he transported it in any manner and that it is reasonable to suspect that it was stolen or unlawfully obtained by him. The burden is not placed upon the Government to prove facts from which the inference of guilty knowledge by the accused may be drawn. On the contrary, the statute clearly authorizes the court to draw that inference and find the accused guilty on the basis of the mere suspicion that the article has been stolen or unlawfully obtained.

* * *

". . . It hardly needs saying that to permit an accused to be found guilty upon an inference drawn from a mere suspicion coupled with a fact which is innocent in itself is to relieve the prosecution of its burden of proof. It is not within the province of a legislature thus to declare an individual presumptively guilty of a crime . . . "

In BENTON, the court had under consideration a statute prohibiting any person having in his possession any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement. The court said appellant was correct in his contention that criminal intent is an essential element of the crime, and that the statute,

by obligating the defendant to show the implements were not in his possession for a criminal purpose cast upon the defendant the burden of proving the absence of criminal intent, which the statute presumed from the mere fact of possession of the articles. The court held, under the rule of TOT v. UNITED STATES, supra, and MORRISON v. CALIFORNIA, 1934, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664, that the statute was unconstitutional.

In SERIO, the defendant was convicted of falsely altering postal money orders. Venue was laid in the District of Columbia, where a co-defendant had uttered the money orders. There was evidence connecting the defendant with the postal money orders in Maryland, but no evidence of his presence in or connection with the money orders in the District of Columbia. The Government contended there was a judicial presumption or at least an inference that the alteration was done at the place of utterance. The court held since the circumstances in the case pointed to the altering having been done in Maryland there was no room for the presumption unless defendant possessed the orders in the District. The Court referred to the requirements for the validity of an evidentiary presumption as set forth in TOT v. UNITED STATES, supra, and ruled:

" . . . No less is essential for a valid presumption of fact initiated by the judiciary . . .

"The difficulty of detecting the locale of the alteration of an instrument leads to pressure upon the courts to permit a presumption in aid of

proof; but as the Supreme Court held in TOT, . . . the need for a rational relationship may not for this reason be dispensed with; the difference between the conclusion and the fact proved cannot be bridged presumptively where to do so would be arbitrary. . . "

Other cases of similar import are GARCIA v. PEOPLE, 121 Colo. 130, 213 P. 2d 387; and STATE v. GRIMMETT, 33 Idaho 203, 193 P. 381.

The instant case is to be distinguished from cases such as MORANDY v. UNITED STATES, CA 9th, 1948, 170 F.2d 5, where the circumstantial evidence of the taking was sufficient to exclude the possibility of an innocent taking. In that case, in 1946, Mrs. Bloemen owned an automobile in Lowell, Indiana. She gave permission to her husband to drive it. He drove it to Whiting, Indiana, and parked it on the street. When he returned for the car later the same day it was gone, and he had not given anyone permission to remove it and had not seen it since. The defendant was seen driving a car in Oxnard, California, which fit the description of the Indiana car, and shortly thereafter he abandoned the car on a street in Santa Maria. When the car was picked up by the California authorities, it bore a 1946 Minnesota license plate, and under the floor mat were found Iowa and Michigan license plates for that year.

In MORANDY, the circumstantial proof was complete, in that everybody who could lawfully exercise dominion over the automobile, the owner wife and her husband, testified they had

given no permission to anybody else to use the automobile. Also, the defendant's connection with the car, and alteration of the license plates, were circumstances from which his intent to hold the car as his own, and withhold it from the true owners.

It should also be noted with respect to MORANDY that the extent of the inferences, and the sequence of the inferences, which may be drawn from unexplained possession of recently stolen property in a state foreign to the theft, are defined in a far more limited manner than in the charge given to the jury in the instant case.

MORANDY considered the case of BOLLENBACH v. UNITED STATES, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, where in a case involving securities stolen in Minnesota and later disposed of by the defendant and other in New York, the Court condemned as error an instruction advising the jury that "possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." The Ninth Circuit Court of Appeals said of this Supreme Court ruling:

" . . . The ground of the holding is not made clear, but it seems probable that what was thought error in the charge was the use of the work 'presumption.' At any rate, until the Court clarifies its decision we shall assume that it did not intend to ban the

inferences of fact naturally drawable from the unexplained possession of recently stolen property.

"In the present instance the court was careful to instruct the jury that the burden of proving transportation was on the government, and that the possession of property stolen in another state raises no presumption that the possessor transported it in interstate commerce. 'However,' the court added, 'the law is that the possession of the fruits of a crime recently after its commission, --namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an inference pointing towards guilt. The inference fades as time elapses.' We think the instruction correctly stated the law."

In addition to the fact that the instruction approved in MORANDY merely called to the jury's attention the fact that unexplained possession of recently stolen property warrants an inference pointing towards guilt, and did not inform the jury as in the present case, that

". . . the jury would ordinarily be justified in drawing from those facts (possession of recently stolen property in another state than that which it was stolen) the inference that the motor vehicle was transported, or caused to be transported in instate commerce by the accused with knowledge that it was stolen, unless possession of the recently-stolen

unless possession of the recently-stolen property by the accused in such other state is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case." (Tr. p. 110, lines 18-25).

The Court's instruction in the instant case cannot be approved on the basis that it expresses itself, euphemistically, as dealing with "inferences," when, obviously, it is specifying the facts the jury may conclude are established by the evidence; and when, obviously, it casts upon the defendant the burden of overcoming the inference with opposing evidence. In such case, the "inference" becomes a "presumption" and shifts the burden of proof to the defendant. MANN v. UNITED STATES, CA 5th, 1963, 319 F.2d 404, discussed earlier at page 43 hereof.

In addition, the Court's instructions were utterly confusing as to the permissible sequence of inferences. As earlier noted, the defendant contended that before the jury could infer that he had transported the automobile in interstate commerce, it would first have to infer and find that he stole the automobile. The court, by a mistake on its part (Tr. p. 120, lines 19-25--p. 121, lines 1-9) gave an instruction which allowed the jury to infer the defendant transported the stolen automobile in interstate commerce with knowledge it was stolen, only if it had first drawn the inference and found from all the evidence, the defendant stole the automobile. (Tr. p. 112, lines 5-13).

This instruction conflicted with the court's instruction in defining the elements of the crime that "The proof need not show who may have stolen the motor vehicle." (Tr. p. 109, lines 2-3). It also conflicted with the court's lengthy instruction given by the court beginning at Tr. p. 109, line 17, and continuing through line 4 on p. 112, dealing with the inferences to be drawn from unexplained possession of recently stolen property. The court had also advised the jury in the course of opening argument that the Government was correct in asserting it did not have to prove the defendant personally stole the car (Tr. p. 20, lines 1-25), denying defendant's motion for mistrial and refusing to allow defendant to specify the ground of objection thereto.

MORANDY states the rule as to sequential inferences as follows:

". . . Obviously somebody transported it /Mrs. Bloemen's Indiana automobile⁷ in interstate commerce. As seen, it had recently been stolen in Indiana; and appellant did not take the stand or in any way attempt to explain his possession of it in California. The courts have long thought that possession in such circumstances warrants the inference that the possessor was the thief. This judicially sanctioned inference, we may add, had its genesis in human experience, that is to say, it is not a rule conveniently concocted by judges to fill gaps in the proof. Compare TOT v. UNITED STATES, 319 U.S. 463, 63 S.Ct.

1941, 67 L.Ed. 1519. Since the jury were at liberty to infer that appellant stole the car, they were necessarily warranted in concluding that he transported it, knowing it to be stolen, to the place where it was found in his possession."

In the case of TRAVLES v. UNITED STATES, C.A., D.C., 1944, 335 F.2d 698, the defendant was prosecuted for (1) unauthorized use of automobile in the District of Columbia and (2) for interstate transportation of the automobile from the District to Maryland, knowing it to have been stolen. He was acquitted of unauthorized use in the District, but convicted of interstate transportation. The defendant requested an instruction that if the defendant was acquitted on the first count, he must also be acquitted on the second count. The proof in that case was that Joseph Spell parked his 1957 Ford overnight on a District of Columbia street. The next morning, September 16, 1962, it was gone, and was not discovered until two months later when the police found defendant in Maryland behind the wheel of the car after it had collided with a tree. He was bleeding from a gunshot wound in his back. During the month the automobile was stolen, the defendant bought two junked 1957 Ford cars, one from a yard in Virginia and another in Maryland. He submitted the title of his Maryland car to the District of Columbia licensing authority and obtained a District of Columbia title and license tags on September 5, 1962. When he was found in the car, it bore the District of Columbia license

tags appellant got for his Maryland junk purchase, and the public serial number of his Virginia junk purchase, but the confidential serial number was that of the car that was stolen.

There was no testimony that he drove the car to the running place on September 16, 1932, or that he used it in the District during the next two months, or that he transported it into Maryland on or about November 16, when he was found in it.

A defense witness testified Chester Williams drove up in the car and at defendant's request agreed to take defendant and the witness to the witness' house; that an altercation arose over some girls fooling around with them in which defendant was shot and the witness and Williams left defendant in the car. A preacher and his son testified defendant was at their home in Virginia, 145 miles away from the District when the car was stolen. A police detective testified defendant told him he bought the stolen car in Virginia from Williams, and then made the Maryland junk purchase because Williams couldn't give him a title, which contradicted the proof defendant submitted the Maryland title to the District of Columbia licensing authority ten or eleven days before the Spell car was stolen.

This evidence is greatly more incriminating than any in the present case. Nevertheless, the court held that unless the jury convicted defendant of unauthorized use in the District, it could not draw the inference from unexplained possession of property recently stolen, that he had knowingly transported an automobile in interstate commerce.

The court said:

"The unexplained possession of goods lately stolen is prima facie evidence, but does not require, the inference that the possessor was the thief, even though there was no direct evidence of the larceny. In prosecutions solely under 18 U.S.C. §2312 (the basis of count two), where of course only the interstate transportation of a stolen motor vehicle is charged (without accusation of the initial theft which is not a Federal offense), the courts permit the inference from unexplained possession in state B of a motor vehicle lately stolen in state A, that the possessor transported it from state A to state B, knowing it had been stolen.

"This permissible inference in cases under the federal statute is a corollary of the inference permitted in larceny cases from the unexplained possession of recently stolen goods. Under the decided cases, unexplained possession of a stolen motor vehicle justifies the inference that the possessor stole it. So, if the defendant is found in possession in another state, it may also be inferred that he transported the car from the state in which he stole it into the state where he was found in possession.

"Several courts of appeals have had occasion to note this relationship between the inferences: that the inference of interstate transportation

depends upon the inference of theft. The Ninth Circuit said in *Worland v. United States*, 170 F.2d 111 (1948), *cert. denied* 343 U.S. 934, 61 S.Ct. 741, 14 L.Ed. 1607 (1948):

'... where the jury were at liberty to infer that appellant stole the car, they were necessarily warranted in concluding that he transported it, knowing it to be stolen, to the place where it was found in his possession.'

To the same effect is *Mattaglia v. United States*, where the Fourth Circuit said:

'... The decision *Hollenback v. United States* does not repudiate the rule established by a myriad of decisions that possession of recently stolen goods will support an inference that the possessor is guilty of the theft; and if this inference be tenable, it is equally reasonable to infer that the supposed thief engaged in the removal of the stolen property to the point where it was found in his possession. It seems absurd to us to say that the possession of a stolen car in the state of destination gives rise to an inference that the possessor stole the car in the state of origin, but permits no inference that he was a party to the asportation.'

(Emphasis added.)

"The Battaglia reasoning was approved and adopted in Prince v. United States, where the Sixth Circuit also indicated that the inference of unlawful interstate transportation which may be drawn from unlawful possession in the second state flows from the inference that the unlawful possessor had stolen the property in the state of origin. And in the Bray case we indicate the same thinking when we said the Bollenbach opinion 'does not bar an inference from possession of recently stolen goods that the possessor has stolen and transported them.' (Emphasis added.)

"We conclude, therefore, upon reason and upon ample authority as well, that the inference of interstate transportation which may be drawn from unexplained possession of a stolen automobile in a second state springs from and depends upon a prior inference from such possession that the possessor had stolen the car in the first state. And this is true even in those federal districts where the theft itself--which is not a federal offense--is of course not charged in the indictment."

In summation, under the foregoing authorities, the evidence was insufficient to establish the Egan automobile was stolen from the motor company lot. No inference could be drawn from the defendant's unexplained possession of the automobile in Nevada, unless the facts proved the car was stolen, as the inference only arises from possession of stolen

property. The defendant was entitled to judgment of acquittal at the conclusion of the Government's evidence in the first trial, and all the way on through these tortous proceedings.

But if defendant is wrong in that contention, then certainly he is entitled to the reversal of his conviction for the error in permitting the jury to infer that the defendant knowingly transported a stolen automobile in interstate commerce without first requiring the jury to find that the defendant stole the automobile in Arizona.

Defense counsel has examined dozens and dozens of cases upholding Dyre Act convictions, but in all of them, the circumstances proved regarding the elements of theft, interstate transportation, and possession by defendant are greatly more incriminating than in the present case, and often were considered sufficient to support the conviction in the absence of any inferences drawn from unexplained possession. In this case, unless the inferences from unexplained possession are relied on to support the conviction, there is no proof of guilt. The verdict and conviction are the product of stripping defendant of the presumption of innocence, casting the burden of proving a crime was not committed on him, and allowing criminal liability to be predicated on suspicions and guesses. The Government cannot rely on a presumption not supported by the facts WOLF v. UNITED STATES, CA 7th, 1929, 36 F.2d 450; and "substantial evidence means more than a synthesis of a chain of inferences from equivocal fact. UNITED STATES v. WAPNICK, 202 F.Supp. 712.

POINT TWO: AN INSTRUCTION ON PRESUMED INTENT AND A PROSECUTION REQUIRING AS ONE OF ITS ELEMENTS PROOF OF SPECIFIC CRIMINAL INTENT IS PLAINLY ERRONEOUS AND PREJUDICIAL TO THE DEFENDANT.

The instruction given by the Court on presumed intent appears at Tr. p. 106, beginning at line 10 and continuing through line 4 on page 107, and is hereinabove set forth under Specification of Errors number 6, together with the circumstances of objection to this instruction at an earlier trial and the circumstances due to which the defendant inadvertently failed to renew this objection at the Third Trial.

It cannot be disputed that specific criminal intent is an element of the crime under consideration, MORISSETTE v. UNITED STATES, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, and the Court instructed the jury to such effect in this case. (Tr. p. 105, lines 16-21).

In the case of BLOCH v. UNITED STATES, CA 9th, 1955, 223 F.2d, 297, this Honorable Court reversed a conviction for fundamental error in the charge under Rule 52 (b) Federal Rules of Criminal Procedure, 18 U.S.C., where the Court erroneously gave instruction on presumed intent although the defendant had made no objection to the charge given. This Court approved the following language from the MORISSETTE case:

"We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption

The authority of the Congress to enact the National Motor Theft Act is derived from its power to regulate interstate commerce, and prevent the transportation of stolen automobiles in interstate or foreign commerce, within its power to forbid and punish the use of such commerce to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state or origin. BROOKS v. UNITED STATES, 267 U.S. 432, 69 L.Ed. 398, 45 S.Ct. 345, 37 A.L.R. 1407. Congress has no power to punish unauthorized transportation or possession of property (even stolen property) in the forum state. DAVIDSON v. UNITED STATES, CA 8th, 1932, 61 F.2d 250.

The circumstances of this case did not prove the commission of a federal offense within the jurisdiction of the lower court.

which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.

In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The Court's instruction in the present case in stating: "so unless the contrary appears from the evidence" casts the burden of proof on the defendant to establish his innocence of criminal intent, a matter which the Court said in MANN v. UNITED STATES, CA 5th, 1963, 319 F.2d, 404: "is specifically harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results." See also CHAPPELL v. UNITED STATES, CA 9th, 1959, 270 F.2d 274; UNITED STATES v. BARASH, CA 2d, 1966, 365 F2d 395.

The effect of this instruction, together with the error in the instructions raised under Specification of Errors

numbers 7, 8, and 9, permitted the jury to presume the commission by the defendant of the ultimate acts involved, and allowed them to presume criminal intent and allowed them to convict, not on the basis of proof beyond a reasonable doubt, but such standard as would apply in a civil action.

POINT THREE: THE TRIAL JUDGE INVADED THE PROVINCE OF THE JURY IN A MATERIAL MATTER TO DEFENDANT'S PREJUDICE BY ASSUMING IN ITS INSTRUCTION AS TO THE ELEMENTS OF THE CRIME THAT THE DEFENDANT TRANSPORTED THE AUTOMOBILE IN INTERSTATE COMMERCE.

The foregoing point is raised with respect to Specification of Error No. 7, wherein the Court's entire instruction as to the elements of the offense is set forth, from Tr. p. 108, beginning at line 11, continuing through line 3 of p. 109. In the body of this instruction the following appears:

"The second element, did the defendant transport the automobile in interstate commerce.

"Third, that when so transported the defendant knew that the motor vehicle had been stolen."

The Court had previously ruled it would give Defendant's Proposed Instruction No. A on the elements of the crime, which set forth in simple declarative form the three elements required to be proved. (R. p. 154). In departing from the form of said proposed instruction, and in phrasing the second

element in interrogative form, followed by the third element stated in declarative form, the harmful factual assumption on the part of the court was made known to the jury.

The correctness of the proposed instruction, and the error inhering in the charge given by the Court, are both made clear in the following holding from the case of DIXON v. UNITED STATES, CA 8th, 1961, 295 F2d 396, where such an assumption was made with respect to the issue of theft of the automobile by the defendant:

"In Dyer Act prosecutions the Government is required to establish the existence of three essential elements. One, that the motor vehicle was stolen, that is, that possession thereof was obtained through larceny, or that there was a felonious conversion with intent to deprive the owner of the vehicle within the meaning of United States v. Turley, supra; two, that the defendant transported the automobile in interstate commerce, and three, that when so transported the defendant knew the motor vehicle had been stolen. Here, both the first and second elements were in controversy and, of course, were fact questions which the jury was required to resolve. Certainly there was substantial competent evidence from which the jury, under proper instructions, reasonably could have found against the defendant on both issues, but we are persuaded to believe that the underlying question of whether the automobile

had been feloniously converted by defendant was not submitted in clear and concise language. Indeed, the charge, insofar as it touched on this element of the offense, was so couched that, conceivably, it served to confuse rather than clarify the issue. Thus at the outset of the charge, the Court stated, 'We are not concerned here with whether or not the man stole the car. It is a question of whether or not he transported it across the state line knowing it to have been stolen.' This statement was followed with: 'It so happens in this case, of course, that if the man didn't take the car wrongfully or within the meaning of the law, he will not be guilty.'

(Emphasis supplied.)

"We are satisfied that the portion of the charge under scrutiny cannot be sustained as constituting legitimate and proper comment on the evidence. Sullivan v. United States, 85 U.S.App.D.C. 409, 178 F.2d 723. The challenged statements not only invaded the province of the jury as to a material matter, but thereby the court prejudicially assumed, upon a finding that the automobile had been driven into Missouri, that the defendant had wrongfully and feloniously acquired possession thereof and converted the same with intent to deprive the owner of the benefits of ownership.

"Since no portion of the charge, which we have

considered as a whole, can properly be regarded as having submitted the element of felonious conversion of the automobile, it necessarily follows that the vice and ill effects of the portion under attack were not cured and rendered harmless by the remainder of the charge."

POINT FOUR: THE TRIAL COURT IN VIOLATION OF THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION INSTRUCTED THE JURY WITH REGARD TO AN EVIDENTIARY PRESUMPTION WHICH WAS NOT WARRANTED BY THE PROOF.

The foregoing proposition is addressed to the matters contained in Specifications of Error Nos. 8 and 9, and also to the matter contained in the Court's charge objected to under Specification of Error No. 7, wherein the jury was instructed the proof need not show who may have stolen the motor vehicle. (Tr. p. 109, lines 2-3).

The errors in the charge are under the circumstances of this case inextricably wound about the issues raised with respect to the sufficiency of the proof to establish the corpus delicti, and the crucial fact of the stealing of the automobile. The entire matter is treated under Point One hereof, wherein the authorities clearly establish that before the circumstances unexplained possession are sufficient to give rise to any inferences pointing toward guilt, it must be established the possession is of stolen property; and that before the jury can

infer the ultimate facts, that the defendant knowingly transported a stolen motor vehicle in interstate commerce from the fact of unexplained possession, it must (in the absence of other proof thereon) first determine under all the evidence that the defendant stole the car and then it may permissibly infer that since he stole it he was the one who transported it in interstate commerce.

Reference is made to the entire argument under Point One, in support of this Point Four, with specific reference, on the matter of instructions to the cases of MORANDY v. UNITED STATES, CA 9th, 1948, 170 F.2d 5; and TRAVERS v. UNITED STATES, C.A., D.C., 1964, 335 F.2d 698, and authorities therein cited and discussed, all of which have been the subject of discussion and argument under Point One.

POINT FIVE: THE TRIAL COURT CHARGED THE JURY IT COULD AND SHOULD DETERMINE WHETHER OR NOT THE DEFENDANT'S GUILT WAS PROVED UNDER A LOWER STANDARD OF PROOF THAN PROOF BEYOND A REASONABLE DOUBT.

This point is addressed to that portion of the charge to the jury set forth as Specification of Error No. 9, which instructed it there was nothing peculiarly different in the way the jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. They were expected to use their "good sense" and give the evidence a reasonable and fair construction, in the light of their common

knowledge of the natural tendencies and inclinations of human beings. The meaning of this instruction is utterly foreign to a system of jurisprudence where due process of law requires that the presumption of the defendant's innocence can only be overcome by proof beyond a reasonable doubt of the accused's commission of all of the elements of the crime with criminal intent, in the present case specific criminal intent.

The instruction is derived, verbatim, from §15.06, Mathes & Devitt, Federal Jury Practice and Instructions, p. 157, there entitled: "Judging the Evidence."

This instruction would be plainly fundamentally and prejudicially erroneous even in a case where all the rest of the charge to the jury was letter perfect. In the instant case, it was the final and conclusive deprivation of defendant's constitutional rights.

The defendant's objection to the giving of this instruction, which had also been made in substantially the same form at the preceding trial (R. p. 113, lines 21-26, p. 114, lines 1-5), was as follows:

"MRS. QUINTANA: It applies to the proof in this case, not the standard which is required in all criminal cases, but simply the standard that applies in civil cases, that this is manifestly erroneous and is uniquely prejudicial to the defendant in this case for the reason that the proof is circumstantial, and more so than in a case of direct evidence, the jury is required to abide by the universal requirement

that proof be established beyond a reasonable doubt and that a reasonable doubt is such a doubt as would prevent the person from proceeding in respect of the serious [affairs] of his own existence, and they are not entitled to apply the civil standard in the consideration of the evidence." (Tr. p. 120, lines 5-16).

There can be no doubt that the court's giving of this instruction was deliberate. But it has been held that even an inadvertent departure from this standard in the charge constitutes reversible error. In the case of UNITED STATES v. CRESCENT-KELVAN CO., CA 3rd, 1948, ^{164 F.2d 582,} the trial court inadvertently stated throughout its charge that the guilt of the defendants was to be proved "by proving by preponderance of the evidence their wrongdoing." When the error was called to the court's attention, it instructed the jury the government had the burden throughout the trial of proving every fact essential to the defendants' conviction by proof beyond a reasonable doubt. Counsel requested that the court explain the meaning of reasonable doubt, and omit any further reference in its charge to preponderance of the evidence. Then the court, in response to the suggestion, charged:

"The question of reasonable doubt is the question that you are to determine. If you are satisfied beyond a reasonable doubt that in the first count of the information that there was an adulteration, that is sufficient; if you are satisfied on the second count beyond a reasonable doubt

that this was misbranded, that is sufficient. Does that answer your question? -- that is the preponderance of the evidence."

The court said, viewing the charge as a whole, the necessity of the jury finding the proof was sufficient to prove the defendants' guilt beyond a reasonable doubt was not clear, and ruled that the defendants in criminal cases are entitled to a clear and unequivocal charge by the court that the guilt of the defendants must be proved beyond a reasonable doubt, and reversed the conviction.

It will be noted that no authority for the giving of Instruction §15.06 is cited in Mathes & Devitt, Federal Jury Practice and Instructions. Counsel for the defendant has not been able to discover any reported criminal case in which the charge has been approved. It goes far beyond the charge responsible for the reversal of the conviction in CRESCENT-KELVAN, and is, under our Constitution, utterly, indefensibly, materially and prejudicially erroneous.

POINT SIX: THE DEFENDANT WAS DEPRIVED OF THE BENEFIT OF COUNSEL AT THE TIME OF IMPOSITION OF SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The foregoing point is addressed to Specification of Error number 10, in which the defendant and his attorney were not afforded an opportunity to confer regarding certain matters contained in the pre-sentence report under consideration by the


Court, all set forth in the description of the sentencing procedures contained in the case herein. It will be noted that Rule 32 of the Federal Rules of Criminal Procedure clearly establishes the right of the defendant and his counsel to present to the Court information in mitigation of punishment. The Court proceeded immediately to sentence the defendant after the rendition of the guilty verdict by the jury. It allowed defendant's counsel a period of ten minutes to examine the pre-sentence report used by the Court. It did not allow the defendant to be present during that examination by his counsel. It refused the application of counsel that defendant be allowed to see a portion of the pre-sentence report as to which counsel was without any information as to the defendant's concern therewith or any contention he might wish to make in respect thereto in his behalf.

The case is comparable to PETERS v. UNITED STATES, C.A., D. C., 1962, 307 F.2d 193. See also, generally, PEOPLE v. BETILLO, N.Y. 1967, 279 N.Y.S. 2d, 444, which contains an excellent summation of the authority with regard to the right to counsel at imposition of sentence. Of course, the right to counsel means the right to effective counsel, and is not satisfied by the mere presence of a designated attorney for the defendant, who is not allowed to confer with the defendant regarding the information charged against him in a pre-sentence report, and who, therefore, cannot serve as the defendant's agent and advocate with regard to such matter.

CONCLUSION

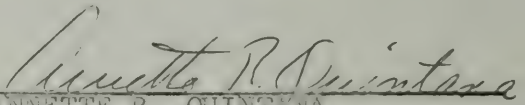
The defendant is entitled to the reversal of the conviction appealed from and the entry of Judgment of Acquittal. The proof is not sufficient to establish the commission of a federal crime or the defendant's guilt thereof. The errors in the instructions, the perplexity of the second jury, and the inability of the first jury to agree, all manifest the impossibility of having a fair and speedy trial under constitutional safeguards pertaining to the criminally accused, where the evidence relied upon by the Government is not sufficient to sustain a conviction; but, if the Court deems otherwise, the numerous reversible errors of law committed in the proceedings in the lower court should not result in a remand of the case for a new trial. As was held in the case of PURVIS v. STATE OF CALIFORNIA, 1964, 234 F.Supp. 147, there is a constitutional limit to the number of times a man must undergo trial. This limit flows from the prohibition in the Eighth Amendment to the constitution of the United States against cruel and unusual punishment.

Respectfully submitted by:


ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEY FOR APPELLANT

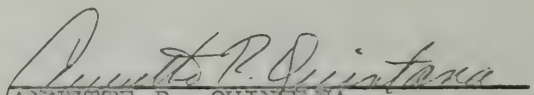
CERTIFICATE OF COMPLIANCE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing brief is in full compliance with those rules.


ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 1967, I delivered three copies of the foregoing Brief to opposing counsel at Las Vegas, Nevada.


ANNETTE R. QUINTANA
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ATTORNEY FOR APPELLANT

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UNITED STATES DISTRICT COURT
OFFICE OF PROBATION OFFICER
DISTRICT OF NEVADA

U.S. PROBATION OFFICER
FEDERAL BUILDING &
U. S. COURTHOUSE
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January 30, 1967

Y TO: Las Vegas Office

Re: SPRADLIN, Howard Dwayne
Docket No. 1434

. Annette R. Quintana
orney at Law
So. 3rd Street
Vegas, Nevada


r Mrs. Quintana:

ase be advised that the confidential Presentence Report
ative to the above-named defendant has been completed and
l be available to you in the Probation Office, Suite 18,
S. 7th Street, at your convenience, from the date of this
ter until 4:30 P.M. on February 10, 1967.

offices are closed from noon to 1:00 P.M., Monday through
day.

Very truly yours,

HUBERT A. BOYD
Chief U.S. Probation Officer
By


EUGENE SADOIAN
U.S. Probation Officer

ff

Appendix "A"

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
)
COUNTY OF CLARK) SS.

ANNETTE R. QUINTANA, being first duly sworn, upon her oath deposes and says:

1. That she is court-appointed counsel for the defendant (appellant) herein, and as to any matter contained in the foregoing brief which is not established by the record, the same is true and correct of her own knowledge.

2. That with respect to that portion of the foregoing brief in the Statement of the Case, wherein the procedures at the sentencing of the defendant are described, that each and every statement therein contained is true of her own knowledge, and further, that:

A. Appendix "B" attached hereto is a true and correct copy of a letter sent to the affiant by mail.

B. Affiant is associated in the practice of law with Harry E. Claiborne, Esquire, 108 South Third Street, Las Vegas, Nevada, and is responsible during periods of time when he is absent from his office, for the discharge of such matters in the protection and prosecution of litigation pending in his office as he may direct.

C. That Mr. Claiborne was necessarily absent from his office from January 30, 1967 until February 10, 1967,

defending the criminal prosecution of Kenneth Ronald Graves by the State of Nevada at Reno, Washoe County Nevada, in Case No. 218973, on a charge of Attempt to Commit Murder in the First Degree

D. During the period of Mr. Claiborne's absence as aforesaid, in addition to numerous matters of regular office procedure which required affiant's attention, she necessarily performed the following:

- (1) Prepared for trial and represented the plaintiffs in a civil jury trial for personal injuries resulting to the minor plaintiff from an explosion of chemicals, in the case of Louis Sturchio, as the Natural Father of Ronald L. Sturchio, a minor, vs. W. L. Holst, dba Walgreen's College Park Drug Store, defendant, which trial commenced in the Eighth Judicial District Court, Clark County, Nevada on February 1, 1967, and continued through all of the following day;
- (2) Appeared for contested motions in divorce actions on Thursday, February 2, 1967, in the case of Azbill vs.

Azbill; and on Friday, February 3, 1967, in the case of Kuehl vs. Kuehl; both before the Eighth Judicial District Court in Clark County, Nevada.

- (3) Appeared for the defendant Danny Kehl on February 6, 1967, at the procedure for imposition of sentence in a prosecution by the State of Nevada on a charge of manslaughter.
- (4) Prepared for trial and represented the plaintiffs in the case of Angus Blad and Marie Blad vs. Bjornson tried to the Eighth Judicial District Court in Clark County, Nevada, to set aside a deed conveying real estate, which trial was had February 7, 1967.
- (5) Was called to come to Reno, Nevada, by plane, the evening of February 7, 1967, for conferences and investigation scheduled that night and the following day in litigation pending against Robert W. Chiatovich, et al. by Old West Enterprises a Nevada corporation, and Texierra Mining Corporation, a

Texas corporation, in Washoe County, Nevada.

- (6) Returned to Las Vegas by plane the evening of February 8, 1967, and spent Thursday, February 9, 1967, in consultation with co-counsel and the said Chiatovich and other defendants, preparing for show cause order to be held in Reno, Washoe County, Nevada, on Friday, February 10, 1967, before the Hon. Judge Gabrielli, in the Second Judicial District Court of the State of Nevada, and appeared at said proceedings in Reno, Nevada representing defendants at a full days' hearing.

E. That before going to the airport in Las Vegas for the flight to Reno on the morning of February 10, 1967, affiant went to the office of the Clerk of the United States District Court in Las Vegas, Nevada, and (not having the letter of notification, Appendix "A", with her) inquired as to the location of the office of the United States Probation Officer, and was informed it was located several blocks away. Being unfamiliar with the location, affiant concluded there was not sufficient time to locate the office, then

examine the report, and still keep her commitment to be on the flight to Reno.

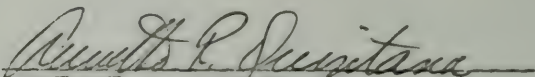
F. On February 13, 1967, the date originally set for sentencing after the Second Trial of defendant Spradlin, the case was continued for sentencing to February 27, 1967 (R. p. 3, docket entry for 2-13-67). Defendant had theretofore filed a Motion for Acquittal, and a Motion for New Trial which were scheduled for hearing and heard on February 20, 1967, and the motions taken under submission (R. p. 140).

G. On February 22, 1967, affiant not having then been notified the trial court had granted defendant's motion for a new trial by order made in chambers in the absence of counsel on February 20, 1967, and still believing the case stood on the calendar for sentencing on February 27, 1967, affiant went to the United States Probation Office on February 22, 1967, to examine the pre-sentence report, but was informed by another occupant of the building the office was closed in observance of Washington's Birthday, which holiday was not being observed by the courts of the State of Nevada.

H. Affiant was necessarily in Reno, Nevada on Thursday and Friday, February 24th and 25th, 1967, for further court proceedings and matters in connection with the litigation described in paragraphs D (5) and D (6) hereof, and it was not

until Monday, February 27, 1967, upon her return to her office,
that Affiant received notice of the order for new trial
(R. 142).

I. Affiant considered in good faith that if
the defendant should stand convicted after the Third Trial
that she would be afforded ample opportunity to examine the
pre-sentence report.


ANNETTE R. QUINTANA

SUBSCRIBED AND SWORN to before me
this 7th day of Sept., 1967.



NOTARY PUBLIC

